GEORGE MOORE.

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LAW FOR ENGINEERS
AND
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BY

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PREFACE

THE field of practice of engineering and architecture is no longer confined to designing and supervising the construction of works; engineers and architects have become counselors and advisers in the investigation and promotion of enterprises, and the main reliance of the building owner for the knowledge he must have as to the requirements demanded by law relating to his project. It follows that the professional man, engaged in building and construction, is constantly being confronted with legal problems relating thereto. In increasing numbers universities and colleges are responding to this need by installing courses designed to teach certain of the legal principles applicable to the engineering profession. Since the time allotted to this study is in most cases relatively short, clearly such a course cannot enable one to become his own attorney; rather it should be designed to give such knowledge of the fundamental legal principles as will assist him in avoiding unpleasant and expensive pitfalls, and to aid him in protecting his employer's, and his own, rights and interests. Inevitably the practicing engineer or architect will acquire such knowledge; but usually it is only after long and costly experience.

It is believed that any engineering course normally should serve two major objectives: First, it should lay down the fundamental principles followed in the engineering profession; and, second, it should indicate by problems or illustrations the manner in which these principles are applied to concrete situations. Most of the text-books covering the field of engineering and architectural law consist of the statement of abstract general principles. It is the purpose of the present volume (1) to state the fundamental principles of law in those branches which bear most directly upon the engineering profession; and (2) to illustrate these principles, wherever time and space permits, with cases wherein engineer, architect, builder, or owner are involved as parties to the suit. Time does not permit all principles to be illustrated with cases; therefore it has been necessary to state many of them directly in text form. Nevertheless the almost universal adoption of the problem or case method of study most forcefully demonstrates that the student's interest is keenest where specific cases are under discussion.

Greater emphasis has herein been given to the law of Contracts than to any other branch, because of all subjects it is the most important and the most fundamental. Each of the requisite elements of a binding contract are considered in separate chapters, agreement, consideration, ca-

pacity, legality, reality of consent, and form. The formation of the contract being complete, its discharge by performance is next considered. Those factual situations which operate to excuse one of the parties from further obligation of performance are in turn examined. Important clauses from standard forms of construction contracts are printed at the head of cases in which their meaning and legal effect have been declared by the courts. Such matters as the duties of architects and engineers in giving certificates, the effect of arbitration clauses, of written orders, of clauses wherein time or quantities are made part of the contract, of the liability of the building owner for payment of subcontractors, and many other related matters are separately dealt with. It is believed that engineers, architects, and contractors should know and understand the limits of their respective rights and obligations, as defined by these clauses in their contracts.

Throughout the book the conventionalized divisions of law are followed, rather than an attempted arrangement in the nature of a functional approach; this, in the interests of clarity and avoidance of repetition and confusion. So the relation of engineer and architect to employer or owner is considered under the general title of Agency, and the legal rights and duties existing between them, resultant through the contract of employment, are pointed out and illustrated through the medium of cases.

The law of Workmen's Compensation, Mechanics' Liens, and Rights in Land, being of special interest to the engineering and architectural professions, are considered separately, and their principles illustrated by cases. Public Utility Regulation, a subject of great importance to the consulting engineer and expert, is explained and in some degree illustrated. Negotiable Instruments and Sales, being subjects not so directly incident to the engineer and architect in their professional capacities, are treated more briefly, but are included, because of their importance to individual business relations. A list of standard forms of Construction Contracts, Invitations to Bidders, Subcontracts, Contracts between Architect and Owner, etc., have been included for purposes of reference and comparison.

In the preparation of this volume the authors have been much assisted by the writings of Professors Williston, Corbin, Britton, Cook, and Mechem.

L. P. S.
E. R. D.

October, 1928.

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ENGINEERING LAW

LAW IN GENERAL

SECTION 1.—THE NATURE OF LAW

Law, in the broadest sense of the word, means an established rule. So defined, it includes, not only the rules which govern human action, but also the course and sequence of events in nature. That an unsupported body falls we regard as the operation of the law of gravitation, meaning thereby that it is a safe prophecy that if the support is removed the body will fall. Similarly, as to human conduct; if it be in accordance with, or in transgression of, the established rule, the consequences may be predicted.

Law may be divided into:

(1) Natural law, meaning thereby the principles by which physical science explains sense phenomena; and

(2) The law of human conduct.

It is law as the body of rules governing human conduct, given as the command of the state in the administration of justice, called positive law, in which we are here interested. Thus we may at once separate from our inquiry all consideration of the moral law, or ethics, since the power of the state cannot be appealed to if it be disregarded. However strong the influence which the moral law exerted as a source of positive law, it is a matter entirely separate and apart.

Positive law has for its subject-matter the definition and enforcement of legal rights and duties between men. If man lived in complete isolation, like Robinson Crusoe on his island, there would be no laws, and no need for them. But as soon as there was an emergence from a state of nature into a social life, the closer relation between man and man created friction and controversy, which necessitated a regulatory force. It was thus that the state came into being. In the lowest stages of civilization, wherever human intercourse exists, some sort of regulation of conduct by law is found.

The idea of law has undergone many transformations. With primitive man, it originated as custom, sanctioned by immemorial tradition

and divine will. The patriarchs or elders of the tribe declared the practices followed in life by the revered tribal ancestors; and these customs took on the validity of established law. The Hindu and Chinese theory was that law is an essential concomitant of human society; that the innate depravity of man, exhibited in the state of nature, requires law to prevent violence and to secure justice; and that for this purpose the state formulates and enforces rules of conduct.

Through seventeen hundred years, originating with the Greek theory of law as existing in reason, growing out of the very nature of man himself, the conception of natural law ruled the roost of European political thought. Law was conceived as existing in nature, to be discovered by reason. Nature was conceived as the embodiment of universal law. Law was held to be discovered, not made. Through the Stoic philosophy, the Roman law, the writings of Cicero, the Church Fathers, Marsiglio, Bodin, Grotius, through the most of Roman and medieval political thought, the concept of natural law held sway. The founders of American government were men profoundly imbued with the theory of the law of nature. The basic theme of the Declaration of Independence is the idea of the natural rights of man, secured, not granted, by governments.

Modern theory discredits the idea of natural law, and sees in the legal system simply a man-made device for regulating and controlling human conduct to promote the ends desired by the dominant element in the community. This is, undoubtedly, the controlling factor in the formation of statute law; and careful analysis of the limitations of logic strongly indicates that it should also dictate the direction of judge-made law.

SECTION 2.—SOURCES OF LAW

The sources of positive law in the United States are (1) legislative enactment and (2) judicial decision. Legislative enactment may take either of two forms, a constitution or a statute. Constitutions are fundamental and basic laws, by which the "sovereign," which in our form of government is the dominant element in the population, designates the organization of the government and defines and limits its powers and activities. By the device of making changes in constitutional legislation difficult, a greater degree of permanence is secured therein than exists as to statutory legislation. The Constitution is the supreme law of the land; and any statutory enactment in violation of its expressed principles and prohibitions is void.

Legislative enactment is often referred to as "written" law, in contradistinction to the "unwritten" law of judicial decision. This written law is to be found: (1) In the Constitution of the United States and in the Constitutions of the several states, which we have herein referred to as constitutional legislation; and (2) in the acts of Congress and of the several state Legislatures and municipal legislative bodies, which we have called statutory legislation.

By far the greater part of the written law is to be found in the statutes, since they deal in detailed form with specific problems; while Constitutions consist largely of general fundamental principles. Thus, from the prominence of the statutes, all of the written law is loosely spoken of as "statutory." Legislative enactment or "written law," being the directly expressed command of the state, supersedes and nullifies any rule already established by judicial decision which is in conflict with it. So the written law, whenever it invades territory already covered by the unwritten law, is supreme.

The other, and most intricate and far-reaching, source of positive law in the United States is the law formulated and promulgated by judicial decision, sometimes called the unwritten law, or the common law. The common law grew up in England through centuries of recognition, by the courts, of customs established through antiquity and regarded as of legal force, in the absence of more directly authoritative rules. Under the common-law system, when a court has once laid down a rule in deciding a case, that rule becomes binding precedent upon it, and upon all subordinate courts in the same jurisdiction, for the future.

"* * * A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed." [1]

This practice of the common-law courts of adherence to established precedent until repealed by legislation is known as the "doctrine of *stare decisis*."

Custom was the most important source of the common law. In order that custom be accorded recognition as law, it must have been in existence since time immemorial, or, as Blackstone put it, "so long that the memory of man runneth not to the contrary." At a very early time, beginning

[1] Kent, Comm. lecture 21.

with the Year Books in 1272, the courts began to keep a record of their decisions; and upon new cases being presented it became the practice for the judges to search these records to see if the question before the court had not already been decided, this being a procedure less difficult than an examination of what the custom actually was. So habitual has this practice become, and so vast the number of decisions recorded at the present time, that custom is almost never resorted to in the decision of a case, and lawyers have almost forgotten that they are the basis of the common law. Thus it is said that the common law is embodied in the cases.

In America the common law of England forms the basis of our jurisprudence in all states except Louisiana. As to all subjects not specifically covered by legislative enactment the common-law rule prevails.

"It is contended that the Code of 1881, which makes the common law of England the rule of decision in all courts of the state of Washington, is decisive as to the rule to be applied. We agree to this. But we do not subscribe to the next proposition, that resort can be had only to the decisions of English courts, or to those of American courts which have followed them, to ascertain what the common law of England is or was, unless the English decisions commend themselves to reason, or have been so long and generally followed that to depart from them would tend to unsettle what has, by 'immemorial and universal usage,' been understood to be settled. The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the storehouse of reason and good sense, declared the 'common law.' But since courts have had an existence in America they have never hesitated to take upon themselves the responsibility of saying what *is* the common law, notwithstanding current English decisions, especially upon questions involving new conditions. Therefore we have the 'common law' as declared by the highest courts of this, that, and the other state, and by the courts of the United States, sometimes varying in each. And we understand the function of this court to be to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law, but not that the decisions of English courts are to be taken blindly and without inquiry as to their reasoning or application to the circumstances." [2]

Thus the common law of Illinois may differ from the common law of New York or of England. It is the body of case law formulated by Illinois courts since their inception; founded upon the English common law, but amplified from it. We may properly speak of the common law of any particular jurisdiction, but *the* common law as a general body of

[2] Stiles, J., in Sayward v. Carlson, 1 Wash. 29, at page 40, 23 P. 830, 833 (1896).

legal principle is so vague a concept that Justice Holmes has ironically called it "the brooding omnipresence in the sky." Common law is case law, judge-made law, law formulated by judicial decision.

SECTION 3.—DEVELOPMENT OF LAW

Since the common law of England, as developed to the colonial period, has been adopted as the basis of American jurisprudence, the history of American law is largely the history of English law. Any adequate conception of our existing legal institutions, such as equity jurisprudence, for example, depends upon an examination of the origin and growth of the law of England.

To-day the legal relations of the whole civilized world are governed by two distinct systems of law, the Roman or civil law, and the common law of England. The growth of the Roman law began with the first uprearing of the Roman state, with the first authentic legal records, the Twelve Tables, established 450 B. C. The *Institutes* of Gaius, Theodosius, and Justinian, most particularly the latter, molded the unwritten law of Rome into a code so systematic and perfect that after fourteen centuries it is still operative as the basic law of all European countries, except Great Britain. For in the Middle Ages the newly risen national states of continental Europe adopted as their heritage from the fall of the world empire the civil law of Rome.

Curiously enough, considering the six centuries of Roman occupation of the British Isles, England, of all the European nations, was the only country to develop an independent system of unwritten law. Superimposed upon the Codes of Alfred and Canute and the West Saxon laws came the arbitrary rule of the great court of the Norman conquerors, the Curia Regis, which held its sway for two centuries. With the Magna Charta, in 1215, and the establishment of the Courts of Common Pleas, King's Bench, and Exchequer in place of the Curia Regis, and the formulation by King Edward I of a uniform, though rudimentary, legal system from the Mercian, West Saxon, and Danish laws, came the real beginning of the "common" law of England, so called because it provided rules uniform or common to all parts of the land. Since the thirteenth century the common law has grown and developed into the magnificent structure of logical principle which it is to-day.

GROWTH OF EQUITY JURISPRUDENCE.—One of the most important developments in the formation of English law was the introduction of the principles of equity. The early common-law courts

were limited very strictly as to the jurisdiction which they could or would exercise. Only a few forms of action, or writs, had been invented; and unless a wrong could be brought within the rigid confines of an existing writ the courts refused any relief. If there were no remedy, there was no right. One of the doctrines asserted by William the Conqueror and his successors, the absoluteness of whose power was unquestioned, was that the sovereign was the lawgiver, and therefore above the law, the fountain of all justice. Consequently the king frequently dispensed justice, irrespective of the law courts. If for some serious wrong the law afforded no remedy, the aggrieved party might present his case to the king for relief. The limited jurisdiction of the common-law courts, the rigid character of whose remedial writs increased as the judges came to rely more and more on precedent in interpreting their scope, made great increase in the practice of petitioning the king for relief. These petitions became so numerous that they came to be handled by the king's Chancellor, and later by the Court of Chancery, over which the Chancellor presided. Such was the origin of England's first Chancery Court, or Court of Equity.

At first the king's justice was dispensed with little regard to the status of the petitioner before the law courts, it being entirely presumptuous to question the king's right to interfere with the law, since he was superior to it; but as the Court of Chancery assumed an identity of its own, distinct from the idea of its being the king's representative as the fountain of justice, limitation of its jurisdiction became more practicable. The rule came to be generally recognized that the Court of Chancery could only be resorted to where there was no remedy afforded by the law courts; and that is the rule to-day.

The Chancellor, in rendering his judgments, was at first bound by no rules except such as good conscience and reason dictated, deciding each case according to his own idea of the abstract principles of justice. The decisions were reported, however, and the successive Chancellors felt themselves bound by the precedent of the court's prior decisions. Thus there grew up an extensive body of equity law, supplementary to the body of legal principles formulated by the law courts.

The growth of chancery, or equity, as it is called, met with jealousy and opposition from the law judges. On many occasions the Parliament petitioned the king to limit the Chancellor's activities, but these petitions always met with refusal. An extract from Coke's Fourth Institute reads:

"In the parliament holden 13 R. E. (1390) the commons petitioned to the king that neither the Chancellor nor other counsellor doe make any order against the common law, nor that any judgment be given without due processe of law. Whereunto the king's answer was: The usages heretofore shall stand, so as the king's royalty be saved. * * *"

But, although the jealousy of the common-law judiciary did not result in halting the growth of Chancery, still it secured the passage of a statute extending the jurisdiction of the law courts, so as to afford new writs and remedies for wrongs for which previously there had been no relief at law. And the establishment of the principle that equity's jurisdiction began only where that of the law left off, or in other words that there could be no remedy at equity where there was a remedy at law, permitted the two systems to develop without further conflict.

There is here no space for explanation of the scope of equity jurisprudence, but we may state some of the general principles or maxims:

(1) *Equity will not suffer a wrong to be without a remedy.* This is the most fundamental maxim, for it states the basic idea of the whole system. Equity came into being because of the inadequacy of law to administer complete justice. Where the inflexibility of legal remedy does not afford justice, equity steps in.

(2) *Equity acts in personam.* Here is a most important feature distinguishing equitable from legal relief. The negative nature of law does not permit direct command to the parties. Law acts only against their property, the only command being to the sheriff to seize and sell enough of the defendant's goods and turn over to the plaintiff sufficient of the proceeds to satisfy the money judgment of the court. Equity, on the other hand, has power to act against the person of the defendant, commanding him directly to do or to refrain from doing the particular acts which are the subject of the decree.

(3) *Equity regards that as done which ought to be done.* Thus, if a contract is broken, law may only render a money judgment for damages; but equity will order that the contract be specifically performed.

(4) *He who seeks equity must do equity.*

(5) *He who comes into equity must* do so with clean hands.

(6) *Equality is equity.*

The system of equity jurisprudence in its character as a supplementary portion of the common law was brought with it to America and established as an integral part of our law. Separate chancery courts exist in a few states,[3] but for the most part the same court sits now as a court of law, dispensing strictly legal relief, and now as a court of chancery, administering equity principles to cases for which the law affords no remedy.

The unwritten law of America, therefore, has its origin in the common law of England. Most of the states have by legislative enactment, either constitutional or statutory, declared the English common-law system the basis of judicial decision in all cases where it has not been superseded by statutory or written law. Each jurisdiction has taken as the basis of its law the common law of England in its form as it existed

[3] Alabama, Delaware, Maryland, Mississippi, New Jersey, and Tennessee.

at the time of the Revolution, and has developed it along the lines which to each seemed most in accord with justice and reason. Thus to-day we have the common law of Illinois and the common law of New York, for example; and their common source is their true identity.

SECTION 4.—LEGAL RIGHTS AND DUTIES

The purpose of law is the promotion of the general good in the regulation of human conduct. The means which the law takes to secure this end is the definition of rights and duties existing between individuals. So legal relations form the subject-matter of law. Rights and duties are the most important of legal relations.

A legal right is a power, privilege, or interest recognized and protected by law. The obligation which the law imposes upon others to refrain from violation of a right is a legal duty. Thus, duty is a correlative of right. For example, where A and B have entered into a contract, we may express their legal relations either: A has a right that B shall perform; or B owes A a duty to perform. In other words, if a person possesses a legal right, there exists some other person or persons who are under a legal duty to observe that right.

Rights are of two kinds, namely:

(1) *Primary rights,* or those which exist independent of any individual action, attached to the person solely by virtue of the fact that he is a person and a member of the social order. These primary rights the possessor holds against the whole community; and the whole community—that is, all other individuals—owe a corresponding duty to refrain from the violation of them. For example, a person has the right to be secure in his person and property; and every other person owes him a duty to refrain from any violation thereof.

Suchs rights do not come into being by virtue of any act of the parties; they exist coincidently with ownership of person and property, and are the kind of rights termed by eighteenth century legal theorists "natural rights." These rights are often called "rights in rem" and "rights of ownership." Violations of primary rights are either civil wrongs, torts, or crimes; the latter depending upon whether the statutory law has so declared. Libel, slander, assault, trespass, negligence, and the like, are torts.

(2) *Secondary rights* are those which come into being as the result of individual action, and which exist, not against other persons generally, but only against a particular person or persons. All rights arising out of contract are examples. Suppose A and B contract with each other. Be-

fore this act, their legal relation, or the sum total of rights and duties each owed the other, was fixed. Now, by virtue of their action, their legal relations are changed; the sum total of rights which A previously had against B is now increased by a new right, the right that B perform the contractual agreement. This new right is different in kind from the primary rights, first because it did not exist as necessarily incident to A's person, but came into being by B's act; and, second, it is a right, not against other persons generally, but against B alone.

Another form of rights exists, often called *remedial rights*. Such rights accrue upon the violation of the legal rights mentioned above; that is, they arise in favor of a party injured against the doer of a legal wrong. They amount to a right of reparation, usually money damages. All that is meant by saying that a person has a right of this kind is that, if he applies to the courts, the probability is that the wrong will be redressed. In this sense, as Justice Holmes has observed, a right is something in the nature of a prophecy.

It must be remembered that, although most of the language used in discussing rights and duties talks of them as things or objects, this is no more than by way of figure of speech. This hypostatizing or "thingifying" of an abstraction often leads to misconception of the actual nature of rights. It should be borne in mind that, when we talk of rights and duties, we are speaking of *relations,* not objects.

SECTION 5.—LEGAL PROCEDURE

The decisions of the courts incorporated in the reports form the original sources of legal study; and a proper comprehension of these decisions requires some understanding of the procedure used. At law, the party who starts the suit is called the plaintiff; in equity, he is called the complainant. The party sued is in either case known as the defendant. The first step is to secure jurisdiction of the court over the person of the defendant. This is done by serving him personally with what is known as a summons, the purpose of which is to give actual and written notice that legal action has been instituted against him. Service of summons is very essential, since the court is powerless to render a binding judgment against any defendant not so notified, for every man is entitled to his "day in court"; that is, he is entitled to a chance to appear and interpose any defense which he may have.

The next step in the suit is the filing of a document variously called a declaration, a petition, a bill, or a statement of claim. This consists of a statement of the facts which led to the present controversy, which

facts the plaintiff expects to prove to the court, in order that he may sustain his cause of action. By way of a counterpleading, the defendant then files with the court a written statement of his side of the dispute. His defense may be of several kinds: First, it may be a demurrer, which in substance states that, admitting all the plaintiff says in his declaration to be true, still as a matter of law such facts do not entitle him to recover. A second kind of defense consists of a denial by the defendant of the facts stated in the plaintiff's declaration. This pleading is called an answer or a plea. Or the defendant may admit the facts, but state additional facts in avoidance or excuse of the facts plaintiff alleges. In such case the pleadings continue until one side denies the facts alleged by the other. This raises an issue for decision, and the case is ready to go to trial.

In any suit at law, either side is entitled to a trial by jury, if he so desires. The province of the jury is to decide all questions of fact. It is for the judge to decide questions of law. The first step in a jury trial is the impaneling of the jury. This consists of questioning the individual jurors as to whether any of them have any prejudices for or against either side. Following the selection of the jury, counsel may make an opening statement, each side explaining briefly what they expect to prove in the trial. Then follows the introduction of the evidence. After all the evidence is in on both sides, the judge issues instructions to the jury as to the law relating to the issues raised, and the jury retires for deliberation on their verdict.

After the verdict is rendered, and before the court pronounces judgment, the losing party may make a formal motion for a new trial. If during the course of the proceedings the judge made an erroneous ruling admitting or rejecting evidence, or gave an erroneous instruction to the jury, or refused to give a correct instruction, or if the verdict is against the manifest weight of the evidence, upon this motion the court may arrest the judgment and order a new trial. In the event that the court refuses to grant a new trial, judgment is entered upon the verdict, and the losing party may then take the case on appeal to a court of review, if he is still of the opinion that there was substantial error in the conduct of the trial.

The party who takes the case up on appeal is called the appellant; the other side is called the appellee. On an appeal no new trial is had before the court of review. That court considers simply the record of the proceedings had before the trial court, and the exceptions taken to the alleged erroneous rulings of the trial judge on such matters as process, pleading, admission of evidence, instructions, etc., given during the trial of the case. If substantial error was committed, prejudicial to the losing side, the judgment of the lower court is reversed and the case remanded for a new trial.

The decisions of the courts of review of each state and of the United States are handed down in the form of written opinions. These decisions are collected and printed in book form, and are called reports. A written decision contains a statement of the facts involved in the controversy, the question of law presented, the court's holding on the question, and the reasoning upon which the holding is supported. If the court can find in the reports of its previous cases a former decision in which the identical question has been decided, the precedent there established will ordinarily be deemed conclusive in disposing of the present case. If there is no such decision, then the search is for some case closely analogous in facts and issues. However, if the case at bar presents a question entirely new, it is the function of the court to decide the controversy, and thereby establish a new rule of law, upon the basis of justice and reason; that is, according to the standard of the economic and sociological interests and needs to be affected thereby, not upon any application of the principles of logic, for in the decision of a question by hypothesis "new" the principles of logic are inadequate.

CONTRACTS

CHAPTER 1

OFFER AND ACCEPTANCE

SECTION 1.—IN GENERAL

A contract is an agreement, enforceable at law, made between two or more parties, consisting of a promise to act on one side made in exchange for an act or a promise to act on the part of the other. Two central ideas are involved: (1) Agreement, or the operative facts in the case; and (2) obligation, or the legal effect of these facts. In the first chapter we shall consider what facts are necessary to constitute an agreement; and in the chapters following we shall take up the question of what agreements the law will enforce.

UNILATERAL AND BILATERAL CONTRACTS.—It is to be observed from the definition that the agreement or operative facts may consist of mutual promises, whereby each promisor agrees to perform some future act. In such case the contract is said to be *bilateral.* A bilateral contract is ordinarily defined as *a promise for a promise.* For example, where A says, "I will give you $100 to plow this field," and B replies, "All right, I'll agree to plow it for $100," we have here a contract bilateral in its nature; for obligations are created on both sides growing out of the mutual promises.

But also there are some contracts which consist, not of a promise for a promise, but of a promise for an act. In such case the contract is said to be *unilateral.* For example, if in response to A's offer to pay $100 for the plowing of the field B fails to obligate himself by any promise, but simply goes ahead and plows the field, a contract comes into existence upon the completion of the act for which the promise was given. Note that an offer never becomes a promise until it is accepted, either by the reciprocal promise of the other party, or by the doing of the act in exchange for which it was made.

THE OBLIGATION.—Obligation flows from the promises of the parties. Any promise which the law will enforce creates in the promisor a legal duty of performance. This duty is owed to the person to whom the promise is made, the promisee. By virtue of the legal

duty or obligation assumed by the promisor a correlative right is created in the promisee that the promisor will perform his promise. In any bilateral contract these rights and duties are reciprocal.

"Agreement" is a broader term than "contract," since only the particular kind of agreements which the law will enforce will operate to create contractual legal relations. In other words, only promises *enforceable at law* operate to create legal rights and duties. The requisites of a binding contract are as follows:

(1) **Agreement**; consisting of mutual promises wherein the minds of the parties meet in a single intention.

(2) **Consideration**; upon which the mutual promises may be supported.

(3) **Capacity of parties**; that is, the parties must be capable in law of making a contract binding upon them.

(4) **Reality of consent**; the intention must be voluntary or no true agreement can result.

(5) **Legality**; the object of the contract must not be illegal.

(6) **Formal requisites**; the contract must be in the form required by law.

All of these requisites must be present to make a binding contract. We shall proceed to take up in turn each of these elements in separate chapters.

THE AGREEMENT.—An agreement is the expression by two or more persons, either by words or by conduct, of a common intention to affect the legal relations of those persons. There must be an expression of assent in one and the same intention.[1] Since there must be an expression of assent, there must be communication between both parties of the intention to agree. A secret acceptance of a proposal cannot constitute agreement; nor can an acceptance be made by a party who is ignorant of the proposal. Thus, if a person capture a criminal in ignorance of the fact that a reward is offered therefor, he cannot claim the reward when later he learns of it, for the contract lacks the element of agreement.

An agreement necessarily involves at least two parties; a man cannot make an agreement with himself, for such agreement cannot operate to affect legal relations.

Although an agreement, when consummated, consists of a promise, or mutual promises, it arises from an offer made by one party to another, and an acceptance of the offer by the latter, with the result that one or both are bound by a promise. Offer and acceptance, then, are the operative facts from which an agreement is created. We shall consider them in detail.

[1] Clark, Contracts (2d Ed.) 2.

SECTION 2.—REQUISITES OF AN OFFER

An offer is a communication to the offeree of the offeror's intention to do an act in the future, provided that the offeree will likewise perform some act. The offer may be (1) of a promise for a promise; (2) of a promise for an act; or (3) of an act for a promise. For example, if A says to B, "I will pay you $100 if you will agree to plow this field," here is an offer of a promise for a promise. But if A says, "I will pay you $100 to plow this field," the offer is of a promise for an act. Suppose the proposal comes from B as follows: "I will plow your field if you will agree to pay me $100." The offer is here of an act for a promise. The presence of a street car or bus on the street is a constant offer to the public of the act of carriage for a promise of payment of the fare.

An offer remains an offer as long as it is in existence, until it is accepted by the person to whom it is made. While still an offer, there is no obligation upon the offeror to perform the act which he has proposed to perform. But, upon acceptance, that which was an offer now becomes a promise, creating a legal duty in the offeror to perform. The offer to perform disappears; the duty to perform arises.

Our first question in connection with offers is: What are the requisites of an offer? What necessary elements must be present, in order that an offer may be "binding," in the sense that it may be turned into a contractual promise by acceptance?

COMMUNICATION OF OFFER.—An offer is made only at the moment it is communicated to the offeree. Until this has been done, clearly no contract can result, since there can be no expression of assent with intent to affect legal relations.

DEFINITENESS AND CERTAINTY.—Since an agreement, to be "enforceable at law," must be such as the courts can enforce, it necessarily follows that the first step therein, the offer, must be sufficiently definite and certain as to enable the court to gather what the intention of the parties was and carry that intention into effect. Thus, an offer to sell an acre of land, no particular acre being mentioned, could not be a binding offer, it lacking certainty as to the identity of the subject-matter. In general, it may be said that an offer must be definite as to its terms, price, quantity, and subject-matter. This rule is, however, subject to the limitation that in some cases a missing term may be supplied by implication. Thus, an offer to sell goods, such as cotton, corn, steel, etc., need not name the price, for in the absence thereof the market or reasonable price will be deemed an implied term of the offer. So, also, an offer to sell goods need not nec-

essarily specify the quantity; it being held that any amount up to a reasonable maximum is an implied term of such an offer.

CONTRACTUAL INTENT.—The third requisite of a binding offer is that it clearly evidence a definite contractual intent. Since agreement consists of a common intention to affect legal relations, directly contemplating the creation of rights and duties, the element of contractual intent must be apparent in the offer. For this reason a proposal obviously made in jest is not an offer capable of being made the basis of contractual relations. Serious contractual intent is a necessary element of an offer. However, it is to be noted that, if from the offeror's words and acts one might *reasonably believe* that he was in earnest in his offer, it will be sufficient, whatever his secret intent. The law does not deal with the secret intentions of the parties, but only with intent as outwardly manifested. Apparent intent is sufficient. Thus, where a man offered a seventeen year old girl a thousand dollars if she would continue to keep house for him for another five years, the court held that the offer was valid, notwithstanding the fact that it was not seriously made. "If one addresses to another what appears to be the offer of a contract, and that other accepts, believing that such an offer was really meant, the party offering cannot avoid liability by saying that he did not mean what his words fairly implied." [2]

Also the words used in making the offer must be such as clearly evidence contractual intent. In the following cases, this and other requisites of contractual intent are illustrated.

ANDERSON et al. v. BOARD, ETC., OF PUBLIC SCHOOLS.

Supreme Court of Missouri, 1894. 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707.[3]

Action by Anderson and others against the Board of President and Directors of Public Schools. From a judgment sustaining a demurrer to the petition, plaintiffs appeal.

BARCLAY, J. Plaintiffs appealed from a judgment based on a ruling sustaining a demurrer to their petition. The substance of their allegations is as follows:

Plaintiffs are copartners in the business of building. Defendant is a corporation having charge and control of the public schools and school property in the city of St. Louis. The defendant had a well-known rule in regard to buildings, by which it was provided that all new buildings, etc., should be "let by contract to the lowest and best bidder." Defendant being desirous of erecting a large school building to be known as the "New High School," duly advertised for bids for the erection thereof. The advertisement was this:

[2] Plate v. Durst, 42 W. Va. 63, 24 S. E. 580, 32 L. R. A. 404 (1896).

[3] Statement of facts is omitted.

"Proposals for the Erection of the New High School Building on Grand Avenue. Office of Board of President and Directors of the St. Louis Public Schools. St. Louis, August 28, 1891. Sealed proposals will be received at the office of the secretary on or before Monday, September 7, 1891, at 4 p. m., for the erection of the New High School on Grand avenue. All bids are to be addressed to John W. O'Connell, Esq., chairman building committee, and must be accompanied by a certified check, payable to the order of 'Board of President and Directors of the St. Louis Public Schools,' or cash, amounting to $2,500, which is to be forfeited by the successful bidder if he fails or refuses within five days after the award of contract by this board to enter into written contract, and furnish good and sufficient security, for the faithful performance of the work." * * *

Plaintiffs submitted a bid (in accordance with the above advertisement) to build the proposed high school for $196,965. Defendant refused to accept the bid of plaintiffs; but "without cause, arbitrarily and capriciously, through favoritism and bias," rejected it, and then accepted the bid of another for $197,000. Plaintiffs alleged a loss of profits in the sum of $15,000, and prayed judgment, etc.

The above is a sufficient outline of the facts on which plaintiffs rely.

It is claimed by defendant * * * that, as the plaintiffs' bid related to public work, no action can be maintained for the refusal to allow plaintiffs to execute such work. The contention is that bids for public work are not governed by the general principles of the law of contracts. We do not consider it necessary to examine into the soundness of that contention, as we think the ruling of the trial judge was obviously correct, even conceding to plaintiffs that the transaction should be treated as an ordinary one between individuals, irrespective of the supposed public nature of its subject-matter.

That binding obligations can originate in advertisements addressed to the general public may be assumed as settled law to-day. But the effect to be given to such an advertisement as the basis of a contract depends entirely on the intent manifested by its terms. A public proposal of that nature may be so expressed as to need but an acceptance, or the performance of some act by a person otherwise undesignated, to constitute an enforceable legal agreement. While, on the other hand, the proposal may amount to nothing more than a suggestion to induce offers of a contract by others. * * *

Still less have we any scientific nomenclature for that subdivision of the class of public proposals with which he have now to deal, namely, that class in which is disclosed the intent to invite mere offers of a contract, as distinguished from an intent to propose a contract for direct acceptance by whom it may concern. But the principles to be applied by our law to such proposals are not, on that account, uncertain or obscure. When the intent expressed in the advertised proposal is reduced to certainty by interpretation, our system of administration of law is fully capable of giving effect to that intent.

In the case in hand the advertisement has the following caption: "Proposals for the Erection of the New High School Building on Grand

Avenue." But the opening lines of the official statement, which follows, show that the caption refers to the proposals to be received, and is not intended to describe the effect of the advertisement as a whole. If there was otherwise any doubt on this point, it is set at rest by the last sentence, viz.: *"The board reserves the right to reject any or all bids."* That language demonstrates the nature of the advertisement as a mere invitation for offers for a contract. As such it did not lay the foundation of a completed contract. It was merely the opening of negotiations for a contract. The plaintiffs' bid was a proposal to build, which the defendant, by the terms of its statement, had the right to reject.

The facts in judgment are wholly unlike those considered in McNeil v. Boston Chamber of Commerce (1891) 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559, cited on behalf of the plaintiffs. In that case it was *found as a fact that the defendant had agreed with the bidders to accept the lowest bid,* and accordingly was held liable for a breach of that agreement. But in *the present appeal that essential fact is wanting.* * * * The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or even without any assignable cause. * * * The judgment is affirmed.

MOULTON v. KERSHAW et al.

Supreme Court of Wisconsin, 1884. 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516.

Appeal from circuit court, Milwaukee county.

TAYLOR, J. [On the 19th day of September the defendants, at Milwaukee, wrote and posted to the plaintiff at La Crosse a letter, of which the following is a copy:]

"Milwaukee, September 19, 1882.

"J. H. Moulton, Esq., La Crosse, Wis.—Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of 80 to 95 bbls., delivered at your city, at 85c. per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

"Yours truly, C. J. Kershaw & Son."

[On the 20th day of September, the plaintiff received the said letter and on the same day sent to defendants at Milwaukee a message by telegraph as follows:]

"La Crosse, September 20, 1882.

"To C. J. Kershaw & Son, Milwaukee, Wis.: Your letter of yesterday, received and noted. You may ship me two thousand (2,000) barrels Michigan fine salt, as offered in your letter. Answer.

"J. H. Moulton."

[The next day the defendants notified the plaintiff of the withdrawal of their offer, and refused and have ever since refused to ship the 2,000

barrels of salt ordered, wherefore the plaintiff prays judgment for $800 damages and costs of suit.]

To this complaint the appellants interposed a general demurrer. The circuit court overruled the demurrer, and from the order overruling the same the defendants appeal to this court.

The only question presented is whether the appellant's letter, and the telegram sent by the respondent in reply thereto, constitute a contract for the sale of 2,000 barrels of Michigan fine salt by the appellants to the respondent at the price named in such letter. We are very clear that no contract was perfected by the order telegraphed by the respondent in answer to appellants' letter. * * * The counsel for the respondent claims that the letter of the appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one car-load. On the other hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. * * *

If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent not less than one car-load. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such quantity as the appellants, from their knowledge of the business of the respondent, might reasonably expect him to order. Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the prices named, and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of Justice Foster in the opinion in Lyman v. Robinson, 14 Allen, 254: "That care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. If the letter had said to the respondent we will sell you all the Michigan fine salt you will order, at the price and on the terms named, then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the respondent might have ordered, possibly any amount, or make good their default in damages. The case cited by the counsel decided by the California supreme court (Kleler v. Ybarru, 3 Cal. 147) was an offer of this kind with an additional limitation. The defendant in that case had a crop of growing grapes, and he offered to pick from the vines and de-

liver to the plaintiff, at defendant's vineyard, so many grapes then growing in said vineyard as the plaintiff should wish to take during the present year at 10 cents per pound on delivery. The plaintiff, within the time and before the offer was withdrawn, notified the defendant that he wished to take 1,900 pounds of his grapes on the terms stated. The court held there was a contract to deliver the 1,900 pounds. In this case the fixing of the quantity was left to the person to whom the offer was made, but the amount which the defendant offered, beyond which he could not be bound, was also fixed by the amount of grapes he might have in his vineyard in that year. The case is quite different in its facts from the case at bar. * * *

We, however, place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "we are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.

The order of the circuit court is reversed, and the cause remanded for further proceedings, according to law.

DONNELLY v. CURRIE HARDWARE CO.

Supreme Court of New Jersey, 1901. 66 N. J. Law, 388, 49 A. 428.

Action by Daniel R. Donnelly against the Currie Hardware Company. Judgment for plaintiff, and defendant brings error. Reversed.

DIXON, J. The plaintiff, being about to bid for a contract to build a music pavilion in Atlantic City, submitted the plans and specifications to the defendant for an estimate as to the price at which the latter would do the metal work required, and on March 31, 1899, received a letter from the defendant saying that it would do the work for $2,850. Accordingly the plaintiff put in his bid for the construction of the building, and, after the making of some changes not affecting the metal work, the job was awarded to him, and the contract was signed on April 5, 1899. During the next morning the plaintiff telephoned to the defendant's manager that he had signed a contract for the building, and would be prepared to sign a written contract with the defendant at 4

o'clock that afternoon, to which the manager answered, "All right." Shortly before that hour the plaintiff telephoned to the manager that he had not had time to prepare the contract, and would sign it in the morning, to which the manager again replied, "All right." The next morning the plaintiff called on the manager, and the latter informed the plaintiff that the defendant would be unable to perform the work in the time agreed upon by the plaintiff, and had not room to do the work so quickly, and refused to sign the proposed contract. Afterwards the plaintiff was compelled to pay a higher price for the metal work, and brought this suit for breach of contract. On this state of facts, shown by the plaintiff's evidence, the defendant moved for a nonsuit, and for direction of a verdict in favor of defendant. These motions being overruled, exceptions were sealed.

The case is governed by the rule established in Water Commissioners v. Brown, 32 N. J. Law, 504, where Mr. Justice Elmer, speaking for the court of errors, said: "If it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side." The conversations over the telephone between the plaintiff and the defendant's manager, as well as the testimony of the plaintiff himself, make it clear that a written contract was expected by both parties. Indeed, it cannot reasonably be determined that the parties had agreed upon all the matters which they would expect to have included in their bargain; for the time allowed for the beginning and completion of the work and the mode of payment are generally provided for expressly in such arrangements, and on these points their negotiations had been silent, awaiting, probably, the outcome of the plaintiff's proposal for the erection of the building. We therefore think that no contract was made by the defendant and that the motions mentioned should have prevailed.

The judgment is reversed.

SECTION 3.—DURATION OF OFFERS

(A) In General

Since an offer is an expression of intention on the part of the person making the offer to enter into new legal relations with the offeree, the question immediately arises: How long will the offer last? Every moment of its duration is regarded as a repetition of the offer; and from its inception to its termination a power exists in the offeree to change its character from an offer to a binding promise by his acceptance. What circumstances, then, will operate to bring an offer to a close? In the first place, since the offer is made by one of the parties alone, his will, expressed or implied, will be determinative of the question of the offer's duration, as well as of all its terms. The offeror is

"the lord of his offer." If he has indicated its duration as a term therein, the offer will be terminated by the lapse of the specified time. If no time is specified, then the offeror's apparent intention as to how long the offer was to last is to be gathered from the circumstances of the case. These and other principles determinative of the duration of offers are set forth in the cases following. It will be found that there are five ways in which an offer will be terminated.

(B) Termination by Lapse of the Time Specified in the Offer

MACLAY v. HARVEY.

Supreme Court of Illinois, 1878. 90 Ill. 525, 32 Am. Rep. 35.

Mr. Justice Scholfield delivered the opinion of the court.

[Action on an alleged contract whereby the appellee employed the appellant to take charge of the millinery department of his store at Monmouth, Ill., and to pay her therefor $15 per week. On March 22, appellant received from appellee the following letter:]

"Monmouth, Ill., March 21, 1876.

"Miss L. Maclay, Peoria, Ill.: I would like for you to trim at H. W. Wetherell's or at Kieth Bros. I will give you $15 per week and pay your fare from Chicago to Monmouth. * * * You will confer a favor by giving me your answer by return mail.

"Yours, John Harvey."

Appellant says she received this in the afternoon, and replied the next day by postal card [accepting the position]. Appellant did not place this in the post office herself, but she says she gave it to a boy who did errands about the house of her sister, with whom she was then staying, directing him to place it in the office. The postmark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until the 25th of March. * * *

If a contract was consummated between the parties, it was by the mailing of appellant's postal card on the 25th of March. * * * It was said by the Lord Chancellor, in Dunlop v. Higgins, 1 House of Lords Cases, at page 387: "Where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. * * *"

This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here that the nature of the business demanded a prompt answer,

and the words "You will confer a favor by giving me your answer by return mail" do, in effect, "stipulate" for an answer by return mail. Taylor v. Rennie, et al., 35 Barb. [N. Y.] 272. * * * Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or, at farthest, by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d, to have him mail it. Her duty was not to place an answer in private hands, but in the post office. The boy was her agent, not that of appellee, and his negligence in mailing the postal card was her negligence. * * *[4]

Judgment affirmed.

(C) Termination by Lapse of Reasonable Time, Where None Specified

In re KELLY.

Supreme Court of Errors of Connecticut, 1872. 39 Conn. 159.

Petition for the payment of a reward offered by the town of Rocky Hill for the detection and conviction of a criminal; brought to the superior court, and heard before Phelps, J.

The petition alleged that on the 26th day of October, 1865, the selectmen of the town of Rocky Hill publicly offered a reward of two hundred dollars to any person or persons who should make discovery and give information against the person or persons guilty of the crime of burning the barn of Mrs. Hepzibah Kelly, on October 1, 1865, so that he or they might be tendered to justice and convicted; that the petitioner made discovery and gave information [on May 1, 1867] against one Nathaniel B. Goodrich, who was guilty of the crime of burning said barn, so that he was tendered to justice and convicted of said crime. * * *

Foster, J. * * * The claim that the right to this reward is barred by lapse of time since the advertisement was published is not well founded. The case of Loring v. City of Boston, 7 Metc. (Mass.) 409, is not applicable. The reward offered in that case was not for the discovery and punishment of crimes already committed; it was wholly prospective, being "for the apprehension and conviction of any person who shall set fire to any building within the limits of the city." The advertisement was first published on the 26th of May, 1837, and was continued for about a week. In January, 1841, three years and eight months after, there was a fire within the city set by an incendiary, which consumed several buildings. The plaintiff caused the guilty party to be arrested, and he was tried and convicted. On suit brought to recover the reward, the only question was whether said offer of reward continued to be in force at the time of the fire. Chief Justice Shaw, who gave the opinion of the court, said it was manifest that the offer, though not

[4] The dissenting opinion of Dickey, J., is omitted.

limited in terms, could not have been intended to be perpetual, or to last ten or twenty years, or more; it must have been understood to have some limit. There being no limit in terms, by a general rule of law it must be limited to a reasonable time, and as the court thought three years and eight months not a reasonable time, under the circumstances, they gave judgment for defendants.

We make no question as to the entire correctness of this decision, and readily assent to the soundness of the principles on which it rests. But the case at bar is of a totally different character. Here, a reward was offered to any one who should make discovery and give information, etc., as to a crime committed on a previous day, specifically pointed out. The offer, it is true, is not limited in its terms as to time, but the statute of limitations, which is applicable to the crime in question, necessarily restricts the offer to the period within which the delinquent must be informed against and prosecuted, three years next after the offence was committed. So long as the statute of limitations continued to run against the offender, so long would this offer of a reward continue good. As soon as the statute becomes a bar to the prosecution, all liability to pay the reward of course ceases, for the conviction of the offender is an event necessarily antecedent to the payment of the reward.

We think the petitioner is entitled to recover; and the superior court is advised to render judgment in his favor. In this opinion the other judges concurred.

MINNESOTA LINSEED OIL CO. v. COLLIER WHITE LEAD CO.

Circuit Court of the United States. D. Minnesota, 1876. Fed. Cas. No. 9,635.

This action was removed from the state court and a trial by jury waived. The plaintiff seeks to recover the sum of $2,151.50, with interest from September 20, 1875—a balance claimed to be due for oil sold to the defendant. The defendant, in its answer, alleges that on August 3d, 1875, a contract was entered into between the parties, whereby the plaintiff agreed to sell and deliver to the defendant, at the city of St. Louis, during the said month of August, twelve thousand four hundred and fifty (12,450) gallons of linseed oil for the price of fifty-eight (58) cents per gallon, and that the plaintiff has neglected and refused to deliver the oil according to the contract; that the market value of oil after August 3d and during the month was not less than seventy (70) cents per gallon, and therefore claims a set-off or counter-claim to plaintiff's cause of action. The reply of the plaintiff denies that any contract was entered into between it and defendant.

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following dispatch to the defendant: "Minneapolis, July 29, 1875. To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri: Account of sales not enclosed in yours

of 27th. Please wire us best offer for round lot named by you—one hundred barrels shipped. Minnesota Linseed Oil Company."

The following answer was received: "St. Louis, Mo., July 30, 1875. To the Minnesota Linseed Oil Company: Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer. Collier Company."

The following reply was returned: "Minneapolis, July 31, 1875. Will accept fifty-eight cents (58c), on terms named in your telegram. Minnesota Linseed Oil Company."

This dispatch was transmitted Saturday, July 31, 1875, at 9:15 p. m., and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between eight and nine o'clock.

On Tuesday, August 3, at 8:53 a. m., the following dispatch was deposited for transmission in the telegraph office: "St. Louis, Mo., August 3, 1875. To Minnesota Linseed Oil Company, Minneapolis: Offer accepted—ship three hundred barrels as soon as possible. Collier Company."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis: "Minneapolis, August 3, 1875. To Collier Company, St. Louis: We must withdraw our offer wired July 31st. Minnesota Linseed Oil Company."

Answered: "St. Louis, August 3, 1875. Minnesota Linseed Oil Company: Sale effected before your request to withdraw was received. When will you ship? Collier Company."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon. It is urged by the defendant that the dispatch of Tuesday, August 3d, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil. The plaintiff, on the contrary claims, 1st, that the dispatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

Nelson, District Judge. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. See 14 Am. Law Reg. 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also, Trevor v. Wood, 36 N. Y. 307.

The reason for this rule is well stated in Adams v. Lindsell, 1 Barn. & Ald. 681. The negotiation in that case was by post. The court said: "That if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was

accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on ad infinitum." * * * In the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock, on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Pars. Cont. 482, 483.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (volume 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. * * * If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an oppor-

tunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied. Judgment accordingly.

(D) Termination by Death or Insanity of Offeror

PRATT v. TRUSTEES OF THE BAPTIST SOCIETY OF ELGIN.

Supreme Court of Illinois, 1879. 93 Ill. 475, 34 Am. Rep. 187.

[Judgment in the lower court against Mary L. Pratt, as administratrix of the estate of Philemon B. Pratt, deceased, on two promissory notes executed by the deceased to the appellees. The purpose in giving the notes was to enable the church represented by the appellees to purchase a bell. It appears that during the lifetime of Pratt there was no undertaking on the part of the appellees, nor of the church, to purchase a bell, and no act done or liability incurred in reliance upon these notes.]

Scholfield, J. * * * It is shown that a bell has been procured, and probably there is evidence sufficient to show that this has been done on the faith of those notes, but it appears with reasonable certainty that this has been since Pratt's death. If a contract therefor was made in Pratt's lifetime, the record unfortunately does not show it. * * *

Where notes are given by way of voluntary subscription, to raise a fund or promote an object, they are open to the defence of a want of consideration, unless money has been expended, or liabilities incurred which, by a legal necessity, must cause loss or injury to the person so expending money or incurring liability, if the notes are not paid. * * *

The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon. * * * Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer, until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man. * * *

We are of opinion, on the record before us, the judgment below was unauthorized. It must therefore be reversed and the cause remanded.

Judgment reversed.

(E) Termination by Revocation

(1) Revocation of Unilateral Offers

A unilateral offer being an offer of a promise for an act, there is no acceptance until the act has been completed. Moreover, the offer having been made by one of the parties alone, he may put an end to that which he has created. Therefore the offeror may terminate the offer at any time before acceptance. Suppose that A offers B $100 to plow his field. B, without obligating himself by any promise to do so, starts plowing the field. Suppose, further, that when B has only one furrow left to plow to finish the job, A tells B, "I revoke my offer." Since the offeror can revoke at any time up to acceptance, and since a unilateral offer is accepted only when the act is completed, it is clear that in these circumstances, until the last furrow is plowed, there is no contract. The logic of this conclusion is clear, for at any time B could have stopped work, and A would have had no right of action against him. B was not bound, and therefore A could revoke.

RECOVERY IN QUASI CONTRACT.—The apparent injustice of the operation of these rules is compensated by allowing a recovery in such case upon another theory than that of contract, called *quasi contract*. The basis of the idea of quasi contractual liability is unjust enrichment. The law provides that a person may not receive a benefit at the hands of another, under circumstances which negative the idea of a gift, without paying the reasonable value of that benefit. B, then, in the case mentioned, would be entitled to recover from A, not the $100, but the reasonable value or amount which he has been benefited by the plowing. This reasonable value is not measured by the cost to the actor, B, but by the actual gain to A. In any case in which there is no gain or benefit, there can be no recovery on this theory, despite the amount of loss.[5]

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(2) Revocation of Offer Confirmed by an Option

An apparent exception to the rule that an offeror may revoke at any time up to acceptance is found in the case of options. If Smith offers to sell his land to Brown for $10,000, and also offers to hold this offer open for ten days if B will agree to pay him $100 for the privilege, it

5 There are several other theories besides that of quasi contract on which the courts have allowed recovery in the case of revocation of a unilateral offer. Some courts have said that the partial performance constitutes a sufficient consideration to support an implied collateral contract to keep the offer open, and recovery has been allowed on the collateral contract. Also a tort theory has been suggested in some of the cases. See Williston on Contracts, §§ 60 and 60a.

will be observed that here A has made two distinct offers. The offer to hold open the offer to sell, for a consideration, is called an option. Acceptance of this offer forms an option contract; a contract to hold the original offer open and not revoke. The option itself is therefore a contract, performance of which is the holding of the original offer open. Therefore there can be no revocation.

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(3) Revocation in General

BYRNE & CO. v. LEON VAN TIENHOVEN & CO.

Common Pleas Division, 1880. L. R. 5 Com. Pl. Div. 344.

[The defendant company, doing business at Cardiff, England, on October 1, 1879, wrote the plaintiffs at New York, offering to sell 1,000 boxes of tinplates at a price specified. On the 11th of October, immediately upon receipt of this offer, the plaintiffs cabled an unqualified acceptance, at the same time confirming their cable by letter which was received by the defendants in due course of post. On the 8th of October, the defendant company mailed to the plaintiffs a letter revoking their offer of the 1st instant, which revocation was received by the plaintiffs on the 20th of October.]

LINDLEY, J. This was an action for the recovery of damages for the nondelivery by the defendants to the plaintiffs of 1,000 boxes of tinplates, pursuant to an alleged contract. * * *

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. Routledge v. Grant, 4 Bing. 653. For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States. See Tayloe v. Merchants' Fire Insurance Co., 9 How. 390, 13 L. Ed. 187, cited in Benjamin on Sales, pp. 56–58. And it is adopted by Mr. Benjamin. The same view is

taken by Mr. Pollock in his excellent work in Principles of Contract (2d Ed.) p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier.

I pass, therefore, to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted (Harris' Case, Law Rep. 7 Ch. 587; Dunlop v. Higgins, 1 H. L. 381), even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn.

Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles, and practical convenience, require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

* * *

For the reasons above stated I give judgment for the plaintiffs for £375 and costs.

Judgment for plaintiffs.

(4) Effect of Revocation on Recovery of Deposit Accompanying Contractor's Bid

NORTHEASTERN CONST. CO. v. TOWN OF NORTH HEMPSTEAD et al.

Supreme Court of New York, Appellate Division, Second Department, 1907. 121 App. Div. 187, 105 N. Y. S. 581.

WOODWARD, J. The parties to this action have submitted an agreed state of facts, under the provisions of sections 1279 to 1281 of the Code of Civil Procedure, and must be deemed to have waived all technical questions and to have asked the court for a determination of their rights under the facts as thus stated. The board of highway commissioners of the town of North Hempstead, on or about the 10th day of June, 1906, published a notice requesting the submission of bids for the erection of a concrete steel bridge over Udall's mill pond at Great Neck, Nassau county. The notice stated, among other things, where the plans and specifications could be found, and that a certified check for the sum of $1,000 must be delivered with each bid. The plaintiff procured a copy of the plans and specifications, which included, in fact, two plans, one for a four-span bridge and the other for a five-span bridge, and with these plans and specifications before it, on the 3d day of July, 1906, wrote and forwarded a letter, the material portion of which reads as follows:

"For the sum of twenty-three thousand nine hundred and fifty-nine dollars ($23,959) we will furnish all materials and labor, and build complete a concrete steel arch bridge of five spans across Udall's mill pond," etc., and "for the sum of twenty-two thousand two hundred dollars ($22,200) we will furnish all materials and labor and build a four-span concrete steel arch bridge across Udall's mill pond."

With this letter was a certified check for the sum of $1,000. On the same day the said board of highway commissioners, in joint session with the town board of the town of North Hempstead, adopted a resolution:

"That the secretary notify the Northeastern Construction Company that their bid for construction of the bridge across Udall's pond, Great Neck, be accepted, conditioned upon leave being granted by the board of supervisors to issue bonds of the town in the sum of $20,000."

On the morning of the 5th day of July, and before the defendants had taken any steps to communicate this alleged acceptance to the plaintiff, the latter sent a telegram to one of the members of the board of highway commissioners, and to the engineer of such board, not to consider the bid, saying that a letter would follow, and subsequently a letter was duly sent and received by the commissioners, in which the plaintiff claimed to have made an error in each of the two bids aggregating $10,000, and withdrawing the bid. The plaintiff refusing to abide by its bid, the contract was let to the next lowest bidder at a price considerably higher than that of the plaintiff, and the de-

fendants then procured the certified check to be cashed, and they have refused to return the same to the plaintiff, though the same has been demanded. The plaintiff seeks to recover the amount of the check, with interest.

We are of the opinion that the plaintiff is entitled to a return of the deposit. The defendants did not absolutely accept the plaintiff's bid. The acceptance depended upon a contingency which the plaintiff was not asked to consider in making its bid. The defendants were not bound to take any steps to bring about the action of the board of supervisors, and if they had refused or neglected to have done so, or if the board, in the exercise of its discretion, had refused to grant the right, the defendants could not have been held to any degree of liability to the plaintiff, and it is elementary in contract law that both parties must be bound. So that at the time of the plaintiff's' telegram, and at the time its letter was written, there was no valid or binding contract, and so long as there was not a valid contract the plaintiff was free to withdraw its proposition, without sacrificing the deposit which it had been compelled to make as a condition of bidding. But beyond this it is difficult to understand how the plaintiff could be said to have been bound. Two bids were asked for, two bids were made, and there was but one bridge to be constructed. The general resolution of acceptance of the plaintiff's proposition was not entering into a contract for the construction of a four or five span bridge. It was merely a notification that both of the bids were lower than other bids, but the contract was yet to follow; and this was clearly contemplated by the form which was given out for such a contract, in company with the plans and specifications.

In justice and equity the plaintiff is entitled to a return of its money under the facts disclosed, and judgment should be entered accordingly.

* * *

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(5) Recovery of Deposit Where Bid is Made Irrevocable by Statute

MAYOR AND CITY COUNCIL OF BALTIMORE v. J. L. ROBINSON CONST. CO.

Court of Appeals of Maryland, 1914. 123 Md. 660, 91 A. 682, L. R. A. 1915A, 225, Ann. Cas. 1916C, 425.

CONSTABLE, J. This appeal involves the right of a bidder, for a municipal contract, to recover from the municipality the amount of money deposited at the time of submitting the bid, where the bidder requests the withdrawal of the proposal before the opening of the same by the municipal officers. The facts upon which the declaration is based are uncontradicted, and from them it appears: That the appellant, acting through the board of awards, advertised for proposals and bids to construct a schoolhouse in the city of Baltimore. That the appellee, among others, submitted a proposal for said construction,

and in compliance with the advertisement and the provisions of the city charter filed therewith a certified check for $500. On the day the bids were to be opened, and just before they were opened, the president of the appellee company stated to the board that he thought from the information he had gained from the other bidders present that he had made an error in his proposal, and requested to withdraw the same. He had learned that the amount of his bid was very much below that of the others, and so much lower that he felt assured a mistake had been made. The board refused to allow the bid to be withdrawn, and proceeded to open all of the bids, whereupon it was found that the appellee's bid was the lowest by about $14,000. After the opening the board suggested to the representative of the appellee that he go over the estimate for the purpose of discovering where, if at all, the mistake was. It was found that, in making up the general tabulation of the costs of the various items, including the bids of the subcontractors, the amount for heating and ventilating had been put down at $952.13 while it should have been $11,952.13, the amount of the subcontractor's bid, thus making the total of the bid $11,000 less than had been intended. The board, however, awarded the contract to the appellee, which refused to execute the formal contract. Whereupon the board declared the deposit forfeited and readvertised for bids. This suit was then instituted for a return of the $500 deposited. The appellant demurred to the declaration, but the court overruled the demurrer, and the ruling upon the prayers being in favor of the right of action, the appellant has brought this appeal from the judgment rendered against it. The rulings upon the demurrer and the prayers involve one and the same principle of law, so they will be considered as a whole.

An act of the Legislature regulates proposals for contracts with the city of Baltimore. Section 15 of the charter, as amended by chapter 163 of the Acts of 1908, provides as follows:

"All bids made to the mayor and city council of Baltimore for supplies or work for any purpose whatever, unless otherwise provided in this article, shall be opened by a board, or a majority of them, consisting of the mayor, who shall be president of the same, the comptroller, city register, city solicitor, and the president of the second branch, which board, or majority of them, shall, after opening said bids, award the contract to the lowest responsible bidder. * * * Bids when filed shall be irrevocable. The successful bidder shall promptly execute a formal contract to be approved as to its form, terms and conditions by the city solicitor, and he shall also execute and deliver to the mayor a good and sufficient bond to be approved by the mayor, in the amount of the contract price. To all such bids there shall be attached a certified check of the bidder upon some clearing house bank, and the bidder who has had the contract awarded to him, and who fails to promptly and properly execute the required contract and bond shall forfeit said check. The said check shall be taken and considered as liquidated damages, and not a penalty, for failure of said bidder to execute said contract and bond. Upon the execution of said contract and bond by the successful bidder, the said check shall be returned to him. The amount of said check shall

be five hundred dollars, unless otherwise provided by ordinance, or an order or regulation of the department for whose use the bids are made and contract entered into. The checks of the unsuccessful bidders shall be returned to them after opening the bids and awarding the contract to the successful bidders."

In the face of these provisions can a bidder, refusing to execute a contract awarded to him for municipal work, force the return of his deposit, or once having filed his proposal, can he withdraw it before the bid is accepted and recover his deposit? It will be noticed that, in plain terms, the section directs that the bidder shall deposit a certified check to indemnify the city in case he, as the successful bidder, fails to execute the contract and furnish a bond; that bids when filed are irrevocable; and that the contract shall be awarded to the lowest responsible bidder. It certainly must be that there was the intention that these explicit directions should have some force and meaning. We must ascribe a reasonable construction to them or we render the statute a mere nullity. These provisions involve the preliminary steps to the making of the contract for the work to be done. These are the conditions which must be subscribed to by any one who wishes to be in a position to get a contract with the city. They do not make the proposal and the acceptance the contract, but the formal contract is to be entered into later. They make plain to the bidder just what obligation he is entering upon when he submits a bid. He knows that his bid is irrevocable, but he further knows that if he, for any reason, after his bid is accepted, does not want to enter into a contract the condition of his becoming a bidder obligates him expressly to reimburse the city to the extent of $500 damages. If the contract were made by the bid and acceptance, the bidder then would be compelled to carry it out or be responsible for it, without a court of equity, for sufficient cause, relieved him, by rescinding the contract.

Judge Dillon in his work on Municipal Corporations, at section 810 (5th Ed.), expresses the meaning and effect of such a charter provision: "After the opening of the bids, the ascertainment of the lowest or most favorable bidder, and the adoption of a resolution, that the contract be awarded to him does not make a completed contract between the municipality and the bidder, when the charter requires that all contracts relating to city affairs shall be in writing, or when the advertisement so specifies, or when some further step remains to be taken, * * * where a bidder accompanies his bid for the performance of a public work with the deposit of a certain sum, under an agreement to forfeit the sum deposited in case of his neglect or refusal to enter into the contract for the work, and without default on the part of the board he fails to execute the contract, he cannot recover back his deposit, and the board may declare the same forfeited."

And McQuillin on Municipal Corporations, at section 1221, says: "Money accompanying a bid as security that the bidder will enter into a contract if his bid is accepted cannot be recovered if the bidder fails to enter into the contract. The rule that courts incline against forfeitures has no application to such a case, and the rule is never carried to the extent of relieving parties against the express terms of their own con-

tract. A bidder has no right to withdraw his bid even before the bids are opened, nor have the municipal authorities the right to permit him to withdraw it."

Also in 28 Cyc. p. 661: "A bidder has no right at law, nor have the municipal officers power to permit him to withdraw his bid and deposit."

In Wheaton Building Co. v. Boston, 204 Mass. 218, 90 N. E. 598, a contractor had filed a bid with the proper authorities to build a schoolhouse, and was required to file a deposit with his bid. Afterwards he found that he had made a mistake in his estimates, and sued the city for the recovery of his deposit. This case is practically identical with the one at bar. The Massachusetts court held that he could not recover his deposit, and said on pages 222 and 223:

"But it is plain that the statute contemplated some obligation on the part of the bidders, even though there was none on the part of the city. Statute 1890, c. 418, § 5, provides that 'every proposal * * * shall be accompanied * * * by a * * * check or certificate of deposit, for the faithful performance of such proposal. * * *' This section must be given a reasonable effect. It would be a nullity if it should be held that the bidder was at liberty to withdraw without any liability at any time before the formal contract, which alone could bind the city, should be executed. The reasonable construction is to hold that the bidder is bound to stand by his proposal, at least after its acceptance, and to the extent of his bond or deposit, but no further. If the case was free from statutory regulation, and it did not appear that a more formal contract was contemplated, the mere acceptance of the proposal would constitute a contract, and neither party could refuse to carry it out without becoming liable to all the damage sustained. * * * The Legislature, perhaps in recognition of the hardships, which might follow from requiring the bidder to be bound though the city was not, restricted the liability of the former to the extent of the deposit."

To the same effect is Robinson v. Board of Education, 98 Ill. App. 100, where the bidder asked, before the bids were opened, to withdraw his bid because a mistake had been made by him. Also the same ruling in Village v. Gahan, 136 Ill. 523, 26 N. E. 1085; Turner v. Fremont, 170 F. 259, 95 C. C. A. 455; Davin v. Syracuse, 69 Misc. Rep. 285, 126 N. Y. S. 1002.

This may seem a hardship upon a bidder who has actually made a mistake, but if the statute is to have any effect that must be the result. The statute is an essential part of the proposal, and the bidder makes all its terms and conditions an obligation upon himself when he submits a bid. While it may appear a hardship upon the bidder, the practical side, as illustrated by this record, of awarding contracts by closed bidding shows it to be a wise provision for municipalities. After the bids were all in, and before the bids were opened, this appellee easily ascertained from his competitors the amounts of their bids. What would there then be to prevent a dishonest bidder, upon finding that his bid was extremely low, from declaring that he had made a mistake, and thus put the city to the costs of delay and readvertising?

The case of Moffett v. Rochester, 178 U. S. 373, 20 S. Ct. 957, 44 L.

Ed. 1108, relied upon by the appellee, was upon a bill in equity for a reformation of the proposal, and therefore is not authority for the form of action in this case. In fact all of the cases cited by the appellee are cases in equity, and in the most of them there was no statute involved.

Judgment reversed, without awarding a new trial, with costs to the appellant.

(F) Termination by Rejection

The rejection or refusal of an offer by the person to whom it is made definitely terminates the offer. The offeree, after his rejection, cannot then change his mind and accept, for the offer is no longer in existence. Such an acceptance, following a rejection, is no acceptance at all, but a new offer.

So, also, a failure to comply with a term of the offer as to the mode of acceptance, or an acceptance conditionally, or on terms varied from the terms of the offer, will operate as a rejection and put an end to the offer. We will consider some of these forms of rejection in the sections following.

SECTION 4.—REQUISITES OF AN ACCEPTANCE

(A) Conformity with Offer

MYERS v. SMITH.

Supreme Court of New York, 1867. 48 Barb. 614.

[Action by J. Myers on an alleged contract evidenced by correspondence, in which the letters were as follows:]

"J. Myers, Esq., Ilion—Dear Sir: Yours of the 15th inst. came to hand [in regard to your wish to purchase malt]. The malt I have for sale is at Weedsport. I will sell you ten thousand bushels of the malt, 34 pounds to the bushel, 2½ per cent. off for screenings, at ($1.54) one dollar and fifty-four cents per bushel, delivered on the boat at Weedsport. Answer by return mail and direct the letter to Weedsport. Respectfully yours, Thomas Smith."

This was received by the plaintiff Monday, June 20th, who answered within an hour after it was received, and mailed an answer at Ilion, addressed to the defendant at Weedsport. This letter was as follows:

"Ilion, June 20, 1864.

"Thomas Smith—Dear Sir: Your letter under date of June 18th came to hand this Monday forenoon. I will take your malt, ten thousand bushels, deliverable on boat at Weedsport, at 154 cents for 34 pounds to the bushel, and 2½ off for dust or screenings. I will be up as soon as I can get away from home, which will be the last of this week or the fore part of next week. Respectfully yours, J. Myers."

[The next week, Myers came to Weedsport, saw the defendant, and informed him that he had come to make arrangements to receive the malt. The defendant replied that he had shipped a boat load the day before and could not let him have the malt he wanted. Two weeks later the plaintiff called on the defendant and tendered the money for the malt and demanded its delivery. Defendant refused delivery, and plaintiff brings this action on the alleged contract.]

BACON, J. The primary, and indeed vital, question in this case is whether there was a contract between these parties—an agreement upon which their minds met, executed and complete, or whether it was a negotiation inchoate and unperfected until something should intervene and be determined, in order to give it full effect. * * * The leading case in this state is Mactier v. Frith, 6 Wend. 103, 21 Am. Dec. 262, and, without recapitulating the facts in that case, it will be sufficient to say that it establishes the proposition that a bargain, evidenced by an offer in writing on one part, accepted on the other, is to be deemed closed when nothing mutual between the parties remains to be done to give either a right to have it carried into effect; that from the moment when the minds of the contracting parties meet, signified by overt acts, the contract is obligatory, and that whatever amounts to the manifestation of a formed determination to accept an offer of a contract of sale communicated to the party making the offer, is an acceptance which will bind the bargain.

This case was followed, and its doctrine applied, in Clark v. Dales, 20 Barb. 42, where the proposition was by letter as follows: "We will engage to furnish you a boat load of flour the last of next week, same quality sent Gilchrist & Mozer, at $4.76, free to boat." The answer returned was: "We will take the load of flour as per your proposition of the 30th inst." Here, as the court say, the proposition was explicit, and its acceptance unqualified. It fixed the price, quality and quantity of the article, and the place of delivery and the time, with sufficient certainty, and was accepted without qualifications, and was therefore complete, and could not be rescinded by either party without the consent of the other.

Bearing these rules in mind, let us look at the alleged contract in this case, and ascertain whether it contains the necessary elements of a complete and obligatory agreement. * * * If we confine ourselves solely to the letters of June 18th and 20th, the acceptance was not in the terms of the offer, so as to fix and bind the defendant. The offer was to sell the malt in question "delivered" on the boat at Weedsport. The acceptance was of the malt "deliverable" on boat. This is, it seems to me, a manifest variance from the terms of the offer. The words do not mean the same thing; they require, or may require, something to be done quite different, as one or the other should be exacted. If the defendant was only required to deliver on boat, the operation was very simple; it only obliged the defendant to deposit the malt in the boat, necessitating but a single process of handling and weighing. But suppose the plaintiff was uncertain whether he would have it delivered on a boat; that it might perchance be a good speculation to effect a sale

to a third party who might choose some other method of removal. This might, and I think would, require the defendant to separate and handle and weigh the whole 10,000 bushels and hold it ready for delivery in any manner, and perhaps at any time, the plaintiff might direct; and if the plaintiff at some future convenient season should conclude to have it delivered upon a boat provided by him, it would require the whole mass to be again handled, weighed and delivered. An acceptance must be in the words of, or must be entirely accordant with, the terms and conditions of an offer, to bind a party who makes the proposition. [If it is not, it is not an acceptance at all, but a counter offer; and it operates as a rejection of the original offer.] In this case, the variance made the acceptance a different thing from the offer. As thus expressed, it could not have been claimed by the defendant to be binding on the plaintiff, and he could not have maintained an action for its alleged breach; and for this reason * * * the defendant could not have enforced it as a valid contract against the plaintiff, if he had repudiated its obligations. A contract of this nature must be mutual in its obligations, or it has no binding force upon either party. * * *

[For these reasons the judgment of the trial court for the defendant will be affirmed.]

HOWARD v. MAINE INDUSTRIAL SCHOOL FOR GIRLS.

Supreme Judicial Court of Maine, 1886. 78 Me. 230, 3 A. 657.

EMERY, J. The plaintiff's declaration, briefly stated, is that he made a valid contract with the defendant corporation to furnish the mason-work and material on a new school building for $2,400, and that the defendant prevented his going on under the contract after he had incurred expense on account thereof. From the report of the evidence we gather the following facts: The board of managers of the defendant corporation, at a meeting held June 19, 1884, voted to proceed to build a new school building, and appointed a committee of five to advertise for proposals, and to take the necessary measures for such erection. This committee, all five acting, advertised for proposals for furnishing the labor and materials required according to plans, specifications, etc. In answer to said advertisement, the following written proposal was sent in to the committee. The Howard named in the proposal was the plaintiff:

"Hallowell, September 20, 1884.

"To the Building Committee of Industrial School: We propose to put up the superstructure of said building, as per plans and specifications or instructions of your architect, E. E. Lewis, of Gardiner, Maine, for the sum of forty-five hundred and fifty dollars.

"John Hall, Carpenter.
"Howard & Church, Masons."

On the same day, September 20th, the building committee had a meeting, with three members present. They opened the bids, and found

the above bid to be the lowest. The record of the meeting then proceeds, as follows:

"And the contract was awarded to Hall, Howard, and Church for $4,525. Voted that the committee require a bond from the contractors to the amount of contract, for fulfillment; also forfeiture for delay in completing the work."

The same evening the plaintiff met Mr. Rowell, one of the building committee, and asked him, "Who got the job?" and was answered, "Hall, Howard, and Church."

It is evident that up to this point there was no such contract between plaintiff and defendant as is stated in the declaration. The committee's advertising for bids was not an offer. They merely asked for offers. They did not agree to accept any. The first offer in the case was a joint one by Hall, Howard, and Church. Even this was not accepted unconditionally. The committee required a bond, which was never tendered by the proposers. * * *

Plaintiff nonsuit.

PETERS, C. J., WALTON, DANFORTH, LIBBEY, and FOSTER, JJ., concurred.[6]

CEDAR RAPIDS LUMBER CO. v. FISHER.

Supreme Court of Iowa, 1906. 129 Iowa, 332, 105 N. W. 595, 4 L. R. A. (N. S.) 177.

[October 14, 1903, the school district advertised for bids for the erection of a schoolhouse, and in the notice made requirement for a certified check for $500 to accompany each bid. The notice closes thus: "It is the intention of the board to award the contract to the lowest responsible bidder, and to require the successful bidder to give bond, etc., but the board reserves the right to reject any and all bids." Said R. H. Fisher forwarded a bid for the work, and accompanied the same with a certified check for the sum of $500, made payable to the president of the board. At a meeting of the board thereafter held for that purpose, the bids filed were opened, and it was found that out of fourteen Fisher was the lowest bidder. Thereupon, as shown by the secretary's minutes of the meeting, "motion was made and carried that the contract * * * as per plans and specifications be awarded to R. H Fisher, he being the lowest bidder, * * * and that the secretary be instructed to telegraph said Fisher to that effect." The secretary sent to Fisher a telegram as follows: "You are the lowest bidder. Come on morning train." Fisher came, and thereafter, a disagreement arising, the board awarded the contract to another contracting firm.]

6 An acceptance, however, which introduces only an immaterial variance with the offer, is a good acceptance. So, where a bid "for paving Seventeenth avenue in Duluth, under the specifications on file at the board of public works," was accepted "for the laying of the surface on Seventeenth Avenue East," the court held this to be only more exact description of the locality, and an immaterial variance. Warren Bros. v. King, 96 Minn. 190, 104 N. W. 816 (1905).

BISHOP, J. * * * [It was contended that:] In view of the action taken by the board and the sending of the telegram, there was a completed contract. * * * Without stopping to speculate upon the purpose of requiring the deposit of the check, or what might be the rights of the district under some state of facts, it is clear to our minds that there is no warrant for the conclusion that a completed contract was accomplished by the sending of the telegram. The action as in fact taken by the board, considered by itself, cannot be permitted to control the situation. Until communicated to Fisher, it amounted to no more than the forming of a conclusion to accept of his bid and to enter into contract relations with him. It is not enough to determine upon an acceptance, but that determination must be communicated to the other party. * * *

So, too, it is plain that the telegram cannot be given the effect of an acceptance of the bid of Fisher, and so give rise to contract relations, as contended for by appellants. It served no further purpose than the words thereof import, to advise Fisher that his bid was lowest, and that further consideration or arrangement awaited his appearance in response to the invitation to come. * * *

(B) ACCEPTANCE—TIME OF TAKING EFFECT

LUCAS v. WESTERN UNION TELEGRAPH CO.

Supreme Court of Iowa, 1906. 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016.

[Action for damages occasioned by delay in transmitting a telegram. Plaintiff sought to recover profits he would have made in an exchange of real estate, but for the negligence of the defendant in failing promptly to transmit a telegram. The telegram in question was an attempted acceptance of an offer by mail to make a certain trade in real estate, the offeror saying, "I will have to know at once." The telegram was handed to the telegraph company on the morning following the evening of the receipt of the offer by mail, and, through the negligence of the company's servants, was not delivered to the offeror until about 6 p. m. of that day. The defendant company asserted that there was no loss to the plaintiff, because plaintiff's acceptance reached the offeror in time to complete the contract, and because, further, contract was complete upon the delivery of the message of acceptance to the telegraph company. Judgment below for plaintiff.]

LADD, J. * * * Having sent the proposition by mail, he impliedly authorized its acceptance through the same agency. Such implication arises (1) when the post is used to make the offer and no other mode is suggested; and (2) when the circumstances are such that it must have been within the contemplation of the parties that the post would be used in making the answer. * * * The contract is com-

plete in such a case when the letter containing the acceptance is properly addressed and deposited in the United States mails. * * * This is on the ground that the offeror, by depositing this letter in the post office, selects a common agency through which to conduct the negotiations, and the delivery of the letter to it is in effect a delivery to the offeror. Thereafter the acceptor has no right to the letter and cannot withdraw it from the mails. Even if he should succeed in doing so the withdrawal will not invalidate the contract previously entered into.

But plaintiff did not adopt this course. On the contrary, he chose to indicate his acceptance by transmitting a telegram to Sas by the defendant company. Sas had done nothing to indicate his willingness to adopt such agency, and the defendant in undertaking to transmit the message was acting solely as the agent of plaintiff. The latter might have withdrawn the message or stopped its delivery at any time before it actually reached Sas. It is manifest that handing the message to his own agent was not notice to the sendee of the telegram. The most formal declaration of an intention of acceptance of an offer to a third person will not constitute a contract. A written letter or telegram, like an oral acceptance, must be communicated to the party who has made the offer or to some one expressly or impliedly authorized to receive it, and this rule is not complied with by delivering it to the writer's own agent or messenger even with direction to deliver to the offeror. * * *

The plaintiff then did not accept the offer of Sas until the telegram was received by the latter, a few minutes after 6 o'clock p. m. of the day after the letter had been received and the question arises whether this was "at once" within the meaning of the offer which stated that another deal was pending. Like "forthwith" and "immediately," "at once" does not mean instantaneously but requires action to be taken within a reasonable time [in view of the particular circumstances of the case, or,] as said in Warder, Bushnell & Glessner Co. v. Horne, 110 Iowa, 285, 81 N. W. 591, it is synonymous with the words mentioned and "as soon as possible," and is "usually construed to mean within such reasonable time as shall be required under all the circumstances for doing the particular thing." It is doubtful whether the same vigilance should be exacted in the acceptance of an offer to exchange or purchase real estate as in transactions relating to the transfer of chattel property. * * * The circumstances of each case necessarily have an important bearing. There was no evidence of the time a letter, if promptly mailed, might have reached Sas. He had indicated in his letter that he was contemplating another deal, and we think ordinary minds fairly differ as to whether, in these circumstances, an acceptance 23 or 24 hours after the letter had been received was in time to bind the party making the offer, and the issue was for the jury to determine. * * *

Reversed.

POSTAL TELEGRAPH CABLE CO. v. LOUISVILLE COTTON SEED OIL CO.

Court of Appeals of Kentucky, 1910. 140 Ky. 506, 131 S. W. 277.

CLAY, C. * * * [The facts developed on the trial are as follows: On September 11, 1905, N. K. Fairbanks & Co. made an offer to R. D. Winship, a broker in Chicago, for the purchase of ten tanks of oil at 27 cents per gallon, acceptance to be delivered before 12 o'clock on the night of September 11th to Fairbanks & Co.] * * * At 4:16 p. m. on September 11, 1905, R. D. Winship & Co. sent the following telegram to the Louisville Cotton Oil Company, in cipher, which, when translated, reads as follows: "On firm offer can sell ten tank cars bleachable prime summer yellow oil, 27¢ Chicago, September. Answer." At 4:40 p. m. on the same day the Louisville Cotton Oil Company sent an answer in cipher, which, when translated, reads as follows: "Telegram received and offer accepted 27¢ Chicago, ten tank cars bleachable prime summer yellow oil. Memphis Exchange rules and arbitration. On receipt of this please telegraph buyer's name." This telegram was received at appellant's Chicago office at 4:55 p. m., and was sent by a messenger boy to the office of Winship & Co. Winship and his clerk left the office early in the afternoon, and no one was present when the messenger boy arrived. The boy put the telegram under the door of the office, where it was found by Winship the next morning. Winship & Co., however, had an understanding with the telegraph company that all telegrams addressed to them and received at the office of the telegraph company after Winship & Co.'s office was closed should be communicated to Winship at his residence by telephone. Numerous telegrams were received by the telegraph company on the afternoon and evening in question, and were transmitted to Winship by telephone. Winship also called up the telegraph company several times during the evening and asked for telegrams. The telegram in question was never transmitted to him or any one else connected with the firm. When the telegram was found on the morning of February 12th, the market had broken and the price of oil had declined. Fairbanks & Co. declined to confirm the purchase and receive the oil. * * *

It is the contention of appellant that, * * * according to the elementary principles of the law of contracts, the acceptance took effect when the answer of appellee was filed in the telegraph office at Louisville; that, therefore, appellee had a binding and enforceable contract, notwithstanding appellant's negligence in failing to deliver the telegram, and, consequently, was not damaged by said negligence. * * * It may * * * be conceded that, where a person makes an offer, and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post or telegraph, and the answer is duly posted or telegraphed, the acceptance is communicated and the contract is complete from the moment the letter is mailed or the telegram sent. Since agreements made by means of the post or the telegraph are simply

an illustration of the general rule that the offeror takes the risk as to the effectiveness of communication, if the acceptance is made in the manner, either expressly or impliedly, indicated by him, it necessarily follows that the contract is complete as soon as the letter containing the acceptance is mailed or the telegram sent; and it makes no difference whatever that through mistake of the postoffice authorities or the telegraph company, or through accident in transmission, it is delayed or is lost in transit and never received by the offeror. 9 Cyc. 295; Carter v. Hibbard, 83 S. W. 112, 26 Ky. Law Rep. 1033; 2 Joyce on Electric Law, § 881; Jones on Telegraph and Telephone Companies, § 731.

But * * * the rule of law above referred to has no application to the facts of this case. Fairbanks & Co. had the right to attach any condition they pleased to the offer which they made to Winship & Co. Their offer to Winship was only binding in the event they were notified of its acceptance before 6 o'clock p. m. February 11th, or, at the furthest, before 12 o'clock on that night. The evidence is clear and explicit upon this point. Winship & Co. were in no sense the agents of Fairbanks & Co., with authority to bind the latter because of their failure to specify any condition in their telegram to the Louisville Cotton Oil Company. Winship & Co. were independent brokers. They did not make any offer to appellee for the oil in question; they stated that they had on offer and could sell at 27 cents. When appellee accepted, it simply authorized Winship & Co., as brokers, to sell at the price named. It did not thereby secure a contract binding either Winship & Co. or Fairbanks & Co. to accept the oil and pay for it. As the telegram in question was not received in time to enable Winship & Co. to accept the offer of Fairbanks & Co., and as Winship & Co. were therefore unable to make the sale pursuant to the authority contained in the telegram, it necessarily follows that appellant's negligence prevented the sale of the oil according to the terms of the offer. * * * In such a case the mere delivery of the answer to the broker's telegram at the telegraph office, giving the broker authority to sell, would not bind the intending purchaser. Actual acceptance before the time limit expires is absolutely necessary to make the sale binding. [The judgment for the plaintiff should be affirmed.]

Judgment affirmed.

(C) Mistakes in Transmission

AYER v. WESTERN UNION TELEGRAPH CO.

Supreme Judicial Court of Maine, 1887. 79 Me. 493, 10 A. 495, 1 Am. St. Rep. 353.

[Action on the case to recover damages alleged to have been sustained by the plaintiff through an error in the transmission of a telegram by the defendant company.]

Emery, J. On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between

Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: "Will sell 800 M laths, delivered at your wharf, two ten net cash. July shipment. Answer quick." The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondent was as follows: "Will sell 800 M laths, delivered at your wharf, two net cash. July shipment. Answer quick." It will be seen that the important word "ten" in the statement of price was omitted. The Philadelphia party immediately returned by telegraph the following answer: "Accept your telegraphic offer on laths. Cannot increase price spruce." Letters afterwards passed between the parties, which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to wit, at two dollars per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for or explain the mistake in the transmission of the message. The presumption therefore is that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point we must assume that for such an error the company was in fault. Bartlett v. Telegraph Co., 62 Me. 221.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims it extends to the difference between the market price of laths and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds.

1. [Here the court holds that the usual stipulation upon telegraph blanks that the company will not be liable for its negligence in case of mistake or omission in transmitting the message, unless the message is repeated at the expense of the sender, is void as against public policy.]

2. The defendant company also claims that the plaintiff was not in fact damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises the question whether the message written by the sender, and intrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender. The question is important and not easy of solution. It would be hard that the negligence of the telegraph company, or an error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message

a liability he never authorized nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should through such error lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price, by making that error in the transmission. On the other hand, the receiver of the offer may in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receives instructions by telegraph from his principal, and in good faith acts upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, that any other rule would now be impracticable.

Of course, the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else, indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph. * * * It follows that the plaintiff in this case is entitled to recover the difference between the two dollars and the market price, as to laths. [Judgment for the plaintiff, with costs.]

Judgment for plaintiff. All concur.

SECTION 5.—IMPLIED CONTRACTS—OFFER AND ACCEPTANCE IMPLIED IN FACT AND IN LAW

(A) Contracts Implied in Fact

By the definition of contractual agreement, as the expression by two or more persons, either by words or conduct, of a common intention to affect legal relations, the mutual contractual intent may be evidenced not only by words, but also by conduct. Express contracts are such as arise from the words of the parties, whether written or oral, showing an intention to be bound. In many cases, however, the parties have not expressed their intention in words; but their conduct shows that intention quite as plainly. Conduct may take the place of words in the making of contracts. In such case the contract is said to be *implied in fact;* that is, implied from the facts and circumstances of the case. Sending goods in response to an order is an acceptance of the offer to buy contained in the order, an acceptance implied from the offeree's conduct. Where a person boards a street car to ride to his destination, an implied contract has been formed though no words have been spoken. So, also, if a person without permission sends goods to another, under circumstances which negative the idea of a gift, and the latter uses them, he will be liable on an implied promise to pay their reasonable value. The act of sending the goods is the offer; the conduct of the offeree in using them is the acceptance. Thus a subscriber will be liable for the subscription price of a newspaper or magazine so long as he continues to take it from the post office, even though he has written the publisher to discontinue sending.

Every true contract is the result of an agreement; but this agreement may be inferred as a fact from the conduct of the parties as well as from what they have said or written. The most marked difference between express and implied contracts is in the method of proof. Express contracts are proved from direct evidence of what the parties said; an implied contract is proved by circumstantial evidence as to what they did.

(B) Contracts Implied in Law

Contracts implied in law are not true contracts, for they do not arise from any real agreement of the parties. They are simply legal obligations imposed by operation of law, in order to place liability where it belongs. If A steals B's watch, it can scarcely be said that he impliedly promised to pay B for it. But the law, in order to afford a remedy for the wrong, will imply the promise for him to pay A the value. Again,

if a person renders beneficial services to another, reasonably expecting payment, and the person to whom the services are rendered knows it, and permits it, and accepts the benefit of those services, the law implies a promise to pay a reasonable compensation therefor.

To these contracts implied in law the name *quasi contract* has been given, in order to distinguish them from contracts implied in fact, which are true contracts since they arise out of actual agreement. On this theory one may recover money paid under mistake, or under duress or fraud, or for a consideration which has failed, or for beneficial services or materials furnished. Although an insane person manifestly cannot make a promise, yet the law will imply a promise on his part to pay out of his estate for necessaries.

CHAPTER 2

CONSIDERATION

SECTION 1.—CONSIDERATION IN GENERAL

The second element of a binding contract is that the agreement between the parties must be supported by a valuable consideration. Any promise will create a duty to perform it; but the duty may be ethical or moral rather than legal. The law does not enforce all promises. If a person promise another to meet him at a certain place, he has undertaken a duty to be there; but the duty is not one the law will enforce, for the reason that it lacks consideration. Consideration, then, is the test of legal enforceability. There must be consideration for any promise, in order that it become a promise enforceable at law. Consideration is nearly synonymous with price or compensation. It means *something which the law esteems as of value given in exchange for the promise.*

What, then, does the law esteem as of value? In the first place, all forms of property, whether any pecuniary value is connected therewith or not, will be sufficient to constitute a consideration. Thus, the conveyance of a piece of land so worthless as to be entirely without money value would nevertheless be a valuable consideration to support a promise. This is because, in addition to property, the law esteems acquired legal rights as of value. When the purchaser acquires title to land, he acquires new rights in regard to the land against other persons; and acquired rights constitute a consideration. Where A promises to pay B $100 if he will plow his field, and B promises to plow it for the stated sum, B's promise creates a legal right in A against B; and this legal right forms the consideration for A's promise to pay the $100. But in the case of a promise to make a gift, since nothing of value passes to the promisor in exchange for his promise, the promise is not founded upon any consideration, and so is not enforceable.

Furthermore, the thing of value given in exchange for the promise may consist not only of a benefit gained by the promisor. It may, on the other hand, be a detriment suffered by the promisee. The relinquishment of something of value by the promisee at the promisor's request will constitute a detriment. So, if A writes to B, saying, "Give C goods on credit, and I will pay for them," A will be liable on his promise, though he received no benefit, for the detriment suffered by B in parting with his goods at the request of A is a good consideration for A's promise.

Also the undertaking of a *legal duty* by the promisee at the promisor's request, since it is the relinquishment of a right previously held, is a detriment, and constitutes a good consideration for a promise. Thus we may say that, when B agreed to plow the field, he undertook a legal duty, which was a detriment to him; and this legal duty is of itself a sufficient consideration to support A's promise of payment. It is in this sense of legal rights as benefit and legal duties as detriment, that the usual definition of consideration as *a benefit to the promisor, or a detriment to the promisee,* should be understood.

SECTION 2.—FORBEARANCE AS CONSIDERATION

SPRINGSTEAD et al. v. NEES et al.

Supreme Court of New York, Appellate Division, Second Department, 1908. 125 App. Div. 230, 109 N. Y. S. 148.

JENKS, J. This action was tried by stipulation as a common-law action before the court without a jury. The parties are all of the surviving children of Nees, deceased, who died intestate, leaving them his sole heirs at law. Nees died, the owner and seised of realty called the "Sackett Street Property" and the owner of realty, called the "Atlantic Avenue Property," which he held by deed to him as trustee for his children, Sophia and George. Shortly after Nees' death all of the parties, an attorney at law, and friends met in Nees' house. Nees' strong box was opened, and when the deed to the Atlantic avenue property was found therein the attorney handed it to Sophia, saying: "This is yours." The evidence for the plaintiffs is that they, or some of them, were surprised to learn that this deed was to their father in trust for two of the children; for theretofore they had believed that he was the owner and seised in fee. They expressed their surprise, and there were murmurings. Thereupon Sophia spoke up, saying, "We will give you our share in the Sackett street property if you don't bother us about the Atlantic avenue property," and George assented. The Sackett street property was sold thereafter. This action is brought by the other three children against Sophia and George, upon that alleged promise of Sophia and George, to recover their proportionate share of the proceeds of that sale. Sophia and George testified that no such promise ever was made. The learned court gave judgment for the defendants, dismissing the complaint, with costs.

After finding the preliminary facts, which were not disputed, the court found that the defendants, after the death of their father, were seised in fee simple of the Atlantic avenue property and held indefeasible title thereto; that the plaintiffs had no color of right in the Atlantic avenue property, and did not at any time threaten or attempt to assert

any claim of right hostile to the defendants in that property; that there was no compromise, either wholly or partly executed, between the parties, affecting rights which the plaintiffs might have in that property; that the plaintiffs had given up no rights in that property, nor had they changed their position therein; and that a promise (referring to which I have heretofore described as shown by the testimony for the plaintiffs) made by the defendants to the plaintiffs that, if the plaintiffs "would not 'molest,' or 'bother,' or 'make a fuss' about, the defendants' rights on the Atlantic avenue property, the defendants would give the plaintiffs their share in the Sackett street property, if made, would have been without consideration." The plaintiffs appeal.

The record sustains the facts found. Assuming that such promise was made, I am of opinion that there was no consideration shown. In Rector, etc., v. Teed, 120 N. Y. 583, 24 N. E. 1014, Vann, J., for the court says (pages 586, 587 of 120 N. Y., page 1015 of 24 N. E.): "'A valuable consideration may consist of some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.' 3 Am. & Eng. Cyclopedia of Law, 831; Currie v. Misa, L. R. 10 Ex. 162; Chitty on Cont. (9th Am. Ed.) 29; 2 Kent's Comm. 465. It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is in a legal sense injured. The injury may consist of a compromise of a disputed claim or forbearance to exercise a legal right; the alteration in position being regarded as a detriment that forms a consideration independent of the actual value of the right forborne."

The consideration for the promise cannot be found in the fact that there was a compromise of a disputed claim, for there is no evidence thereof. It must rest, then, upon the forbearance to exercise a legal right. Forbearance to assert either a legal or an equitable claim is sufficient consideration, as we have seen. See, also, Wharton on Contracts, § 532, and authorities cited; Leake on Contracts (Randall's Ed.) 438; 1 Parsons on Contracts (15th Ed.) p. 441. It seems unnecessary to consider the conflict over the question whether forbearance as to a claim without foundation can constitute good consideration. See 1 Parsons on Contracts (8th Ed.) p. 441, note, discussing the various authorities. It seems to be the rule with us that it is not essential that the claim should be valid; but it is enough if it could be regarded as doubtful or colorable. In White v. Hoyt, 73 N. Y. 515, the court cites the language of Richardson v. Mellish, 2 Bing. 229: "It is not necessary that the party should have a right to hold, if he be doubtful whether he has a right to hold"—and of Mr. Chitty, when he describes a claim as "colorable." See Cox v. Stokes, 156 N. Y. 491–505, 51 N. E. 316; Zoebisch v. Von Minden, 120 N. Y. 406–419, 24 N. E. 795.

But if the claim be not even doubtful, or colorable, or plausible, in that there is no reason for an honest belief that it has some foundation in law or in equity, then forbearance applied to it is not good consideration. Parsons in his final note (ut supra) says: "In all jurisdictions it would be admitted that forbearance of a claim is no consideration, if the

claimant knows his claim to be unfounded or conceals material facts relating thereto"—citing authorities.

Wharton on Contracts, § 532, says: "The fact that the suit is not well founded makes no difference, if it has a show of title, though it is otherwise in cases of fraud, and in cases where the claim to be forborne is utterly destitute of support." * * *

In the case at bar the court, as I have said, found properly that the plaintiffs had no color of right in the Atlantic avenue property; nor did they at any time threaten or attempt to assert any claim. The evidence of the plaintiffs is that, when they were surprised to find that the deed to the Atlantic avenue property was in trust for but two of their number, thereupon and without any further reason, save that they expressed surprise and were dissatisfied, the defendants made the promise in question. The promise was not even in response to any suggestion of any possible claim then or thereafter against the deed, or despite it, or of any action adverse to it. There was no suggestion, then or at any time thereafter, made that the deed was invalid for any reason, or of any ground upon which it was open to attack. Indeed, I can discover no reason upon the evidence how any of the parties could seriously suppose that even a doubtful or a colorable claim could be asserted then or thereafter. It does not appear that anything was ever done, then or thereafter, in consequence of the alleged promise, or that the rights of the parties were in any way thereby changed or affected.

I think that the judgment must be affirmed, with costs. All concur, except HOOKER, J., who dissents.

HOOKER, J. (dissenting). The circumstances surrounding the opening of the strong box after decedent's death and the finding there of a deed running to the defendants, and the conversation then between the children, seem to me such as to present a situation where there was at least color of a valid claim by the plaintiffs, by reason of their heirship, to the Atlantic avenue property. One of these circumstances is that the strong box where the deed was found belonged to the decedent, and it might well be doubted whether there had ever been a delivery of the deed before the grantor's death, which was necessary to pass title. If such claim was open to be urged, there was consideration for the promise.

The judgment should be reversed.

RIGNEY et al. v. NEW YORK CENT. & H. R. R. CO.

Supreme Court of New York, Appellate Division, Third Department, 1914.
161 App. Div. 187, 146 N. Y. S. 395.

Appeal from Trial Term, Rensselaer County.

[Action by James J. Rigney and others, abutting property owners, for damages from change in grade of street, against the New York Central & Hudson River Railroad Company. From a judgment dismissing the complaint with costs, plaintiffs appeal. Reversed and remanded.]

JOHN M. KELLOGG, J. In the city of Rensselaer the defendant's

railroad intersects Columbia street, passing under a bridge erected and maintained by the defendant as a continuation of the street. There was a clearance between the bridge and the rails in the tracks of about 16½ feet. The bridge and its approaches did not interfere materially with the plaintiffs' premises, or the easy access thereto, and had been maintained in substantially the same condition for about 38 years.

The bridge became unsafe for use in connection with the public street, and the city authorities required that it be repaired or rebuilt. The defendant submitted plans for a new bridge with the same clearance but about 46 feet longer, thereby giving the defendant that much more room for its tracks under the bridge. The city deemed it necessary, apparently for the protection of the men on the freight cars and perhaps others using the railroad, that there should be a clearance of at least 21 feet. The defendant submitted plans raising the bridge accordingly. The city permitted the construction of the lengthened and higher bridge, and passed the necessary ordinances for the work and its approaches upon the defendant executing a contract in which it "expressly covenants and agrees that in the event of any damage resulting from the 'work' as it progresses, or thereafter, as a result, or in consequence thereof, or from any matter or thing connected therewith, arising therefrom, to any person or property including damage resulting from change of grade of street, being approaches to said bridge, it will pay and liquidate the same at its own expense and assume the liability therefor, and in the event of any action or actions, proceeding or proceedings of any kind or description being brought against the city of Rensselaer, by reason of, or on account of, or growing out of said 'work' or its construction, or to prevent the performance thereof, or anything connected therewith, and the said party of the second part will at its own expense defend the same, and will pay any judgment or award recovered therein, and will in all respects fully indemnify and save harmless the said city, its officers, agents and representatives, from any and all costs, expenses, payment of judgment to be recovered or incurred in such action or actions, proceeding or proceedings."

It was not for the interest of the city to have the bridge raised above the street so that it would be necessary to build embankments in the street to make approaches to the bridge. The clearance required could have been made by the defendant by depressing its tracks, leaving the street in substantially its former condition. The requirement of the city did not mean that the bridge must be raised; it simply meant that the defendant should, in a proper way, provide for the necessary clearance. By raising the bridge it became necessary to build an embankment in the street extending out in front of the defendant's premises. By lengthening the approach it made the embankment in front of the plaintiffs' premises higher and extended it further. The defendant evidently felt that it was for its interest to raise the bridge rather than depress its tracks.

* * *

It was the duty of the city to require the tracks to be depressed so that its citizens should not be injured by a change of grade in the street, which would be necessary if the bridge were raised; or, if it permitted

the defendant for its benefit to make the change in the grade of the public street, that it should make good to the abutting property owners the loss which they would sustain thereby.

The defendant was accorded rights by the city which it was not legally entitled to, and the city and the defendant knew that the exercise of those rights must necessarily injure the plaintiffs. It was, therefore, the right and the duty of the city, in granting the favor, to assure protection to the plaintiffs. They may, therefore, recover upon the contract. Bernhard v. City of Rochester, 127 App. Div. 875, 112 N. Y. S. 229; Id., 194 N. Y. 566, 88 N. E. 1114; Wright v. Glen Telephone Co., 48 Misc. Rep. 192, 197, 95 N. Y. S. 101.

It is also proper to observe that, the change of grade being for the benefit of the defendant and not for the benefit of the city, there was at least some question whether an abutting owner might not have a remedy for an injury to his property resulting therefrom. The contract evidently intended to make that matter certain, and provided a liability against the defendant. There was sufficient consideration for that contract, and the plaintiffs are sufficiently connected therewith to enable them to maintain the action.

The judgment is therefore reversed, and a new trial granted, with costs to the appellants to abide the event. All concurred. * * *

AUSTIN REAL ESTATE & ABSTRACT CO. v. BAHN.

Supreme Court of Texas, 1895. 87 Tex. 582, 30 S. W. 430.

GAINES, C. J. * * * In this case, with reference to the question, the trial court found the facts as follows: "That a few days after the note sued on became due, and just before it was assigned to the plaintiff, N. E. Fain presented same to defendant for payment, when said Stacy, as president of defendant company, requested that an extension of one week from that day be given on said note, and that the same be not placed in the hands of attorney for collection until one week, and agreed, if this was done, that he would pay the note within that time," etc. Here the creditor agrees to extend for one week, and the debtor agrees to pay within the week. He does not agree that he will not pay until the end of the week, or that in case he does pay he will pay interest for the entire period of the extension. Hence there was no consideration for the promise of the creditor. In Benson v. Phipps the principal maker of the note and the payee agreed upon an extension for 12 months, from which the promise was implied on part of the former not to sue, and upon the latter not to pay, within the stipulated time. The promise of the debtor to forego his right to pay at any time after the note was originally due secured to the creditor the absolute right to secure the interest for the entire time of the extension, and constituted the consideration for the creditor's promise.

In the case before us it was the right of the company to pay at any time, notwithstanding Fain's promise, and hence there was no consideration to support that promise. The motion for a rehearing is overruled.

SECTION 3.—CONSIDERATION—NECESSITY OF MUTUALITY OF OBLIGATION

CHICAGO & GREAT EASTERN RY. CO. v. DANE et al.

New York Court of Appeals, 1879. 43 N. Y. 240.

[Action for breach of contract to transport iron. Defense, lack of consideration. Defendant had judgment below.]

GROVER, J. Whether the letter of the defendants to plaintiff, and the answer of plaintiff thereto (leaving the question of revenue stamps out of view), proved a legal contract for the transportation of iron by the defendants for the plaintiff from New York to Chicago upon the terms therein specified, depends upon the question whether the plaintiff became thereby bound to furnish any iron to the defendants for such transportation, as there was no pretense of any consideration for the promise of the defendants to transport the iron, except the mutual promise of the plaintiff to furnish it for that purpose, and to pay the specified price for the service. Unless therefore there was a valid undertaking by the plaintiff so to furnish the iron the promise of the defendants was a mere nude pact, for the breach of which no action can be maintained. The material part of the defendants' letter affecting this question is as follows: "We hereby agree to receive in this port (New York), either from yard or vessel, and transport to Chicago, by canal and rail or the lakes, for and on account of the Chicago and Great Eastern Railway Company, not exceeding six thousand tons gross (2,240 lbs.) in and during the months of April, May, June, July and August, 1864, upon the terms and for the price hereinafter specified." This letter was forwarded by the defendants to the plaintiff April 15, 1864. On the 16th of April, the plaintiff answered this letter, the material part of which was as follows: "In behalf of this company I assent to your agreement, and will be bound by its terms."

We have seen that the inquiry is, whether this bound the plaintiff to furnish any iron for transportation. It is manifest that the word "agree" in the letter of the defendants was used as synonymous with the word "offer," and that the letter was a mere proposition to the plaintiff for a contract to transport for it any quantity of iron upon the terms specified, not exceeding six thousand tons, and that it was so understood by the plaintiff. The plaintiff was at liberty to accept this proposition for any specified quantity not beyond that limited; and had it done so, a contract mutually obligatory would have resulted therefrom, for the breach of which by either party the other could have maintained an action for the recovery of the damages thereby sustained. This mutual obligation of the parties to perform the contract would have constituted a consideration for the promise of each. But the plaintiff did not so accept. Upon the receipt of the defendants' offer to transport not to exceed six thousand tons upon the terms specified, it merely accepted such offer,

and agreed to be bound by its terms. This amounted to nothing more than the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendants as it chose; and had there been a consideration given to the defendants for such option, the defendants would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of anv. But there was no consideration received by the defendants for giving any such option to the plaintiff. There being no consideration for the promise of the defendants, except this acceptance by the plaintiff, and that not binding it to furnish any iron for transportation unless it chose, it follows that there was no consideration for any promise of the defendants, and that the breach of such promise furnishes no foundation for an action.

The counsel for the defendants insists that the contract may be upheld for the reason that at the time the letters were written the defendants were engaged in transporting iron for the plaintiff. But this had no connection with the letters any more than if the defendants were at the time employed in any other service for the plaintiff. Nor does the fact that the defendants, after the letters were written, transported iron for the plaintiff at all aid in upholding the contract. This did not oblige the plaintiff to furnish any additional quantity, and consequently constituted no consideration for a promise to transport any such. The counsel for the appellant further insists that the letter of defendant was a continuing offer, and that the request of the plaintiff, in August, to receive and transport a specified quantity of iron was an acceptance of such offer, and that the promises then became mutually obligatory, if not so before. This position cannot be maintained. Upon receipt of the defendant's letter, the plaintiff was bound to accept in a reasonable time and give notice thereof, or the defendant was no longer bound by the offer. The judgment appealed from must be affirmed, with costs.

All concur except ALLEN, J., who did not sit.

Judgment affirmed.[1]

[1] Agreements lacking mutuality of obligation, or, more accurately, mutuality of undertaking, are often classed as "illusory promises," meaning that, although on their face such promises undertake the doing of some act, actually there is no real undertaking. A promise by A to buy "such coal as he would want to purchase from B" in reality undertakes no obligation to buy, and so there is lack of consideration for B's promise to sell. Wickham & Burton Coal Co. v. Farmers' Lumber Co., 189 Iowa, 1183, 179 N. W. 417, 14 A. L. R. 1293 (1920). And a contract to sell to plaintiff "such glue as he might order" was held void for want of mutuality.

But a promise to sell to defendant "all the lumber that plaintiff might cut in the next season" was held to create an obligation; for, although plaintiff might not cut any lumber, still by the promise he assumed a legal duty to sell any he might cut to defendant, and no one else, and this detriment is a consideration for defendant's promise to buy. Ramey Lumber Co. v. John Schroeder Lumber Co. (C. C. A.) 237 F. 39 (1916).

CITY OF BOWLING GREEN v. KNIGHT.

Court of Appeals of Kentucky, 1926. 216 Ky. 838, 288 S. W. 741.

[Action on sewer construction contract by George Knight against the city of Bowling Green. Judgment for plaintiff, and defendant appeals. Affirmed.]

REES, J. On the 12th day of July, 1923, the appellee entered into a written contract with the appellant, city of Bowling Green, to construct a sewer for appellant from State street along Spring alley, the work to be done under the supervision of the city engineer, and the work to conform to the lines and grades given by the engineer, and to be done in accordance with the drawings and directions given by him from time to time, subject to such modifications and additions as might be deemed necessary during the execution of the work. * * * [It was urged on behalf of the city that:] Article 9 of the contract makes it optional with the city engineer whether appellee could continue the work after he had once begun it, and, as the contract does not bind the city to permit appellee to continue the work, it is void and unenforceable for want of mutuality.

Article 9 of the contract is as follows: "The work shall be started as soon as reasonable after the contractor receives word to commence from the engineer, and shall be rushed to completion as rapidly as is consistent with good work. If at any time the engineer decides that the work is not being pushed as it should be, he can order the contractor to relinquish his contract in part or in full, and either relet the remainder of the work or else complete it with city forces."

Where a party reserves the absolute right to cancel or terminate the contract at any time, the contract, if executory, cannot be enforced because lacking in mutuality; but that is not the case here. The city through its engineer had the right to cancel the contract only under certain conditions. The ground upon which the appellant could cancel the contract was that "the work is not being pushed as it should be," which was left to the decision of the engineer. The engineer, however, could not arbitrarily or capriciously exercise his judgment, but must have acted in good faith and on reasonable grounds. Hence the contract was not lacking in mutuality. * * *

Judgment affirmed.[2]

[2] Although it is often said that "a promise on one side is a good consideration for a promise on the other," the necessity for mutuality of obligation shows that only *binding* promises, in the sense of promises creating legal duties, are included in the rule.

SECTION 4.—OPTIONS

In the case of options to purchase, there is what appears to be an obligation upon one side only. If Smith offers to sell a piece of land to Brown for a specified sum, and gives Brown a thirty-day option to purchase, during the stated time it would seem that Smith is bound, but that the offeree may choose to buy or not, as he wishes. Loosely stated, it would seem that the offeror is bound by his promise to sell, but that the offeree has taken upon himself no obligation. Such a statement of the status of the parties is inaccurate. On the one hand, Smith is not bound by any promise to sell, for he has made no such promise. His promise was to *keep open his offer* to sell, for the period of thirty days; and the consideration for this promise is the offeree's payment, or obligation to pay, the price of the option. On the other hand, it is not correct to say that the offeree has taken upon himself no obligation. On the contrary, in exchange for the promise to hold open the offer, he has promised to pay a specified sum, the price of the option. The consideration for his promise may be found either in the benefit accruing to him from the legal right to purchase at any time within the thirty days, or in the detriment suffered by the other party in incurring a legal duty to hold his offer open for the period.

SECTION 5.—PRE-EXISTING LEGAL OBLIGATION AS CONSIDERATION

LINGENFELDER et al. v. WAINWRIGHT BREWING CO.

Supreme Court of Missouri, 1891. 103 Mo. 578, 15 S. W. 844.

[This was an action by P. J. Lingenfelder, executor of Edward Jungenfeld, against the Wainwright Brewery Company upon a contract for services as architect. Jungenfeld, on June 16, 1883, entered into a contract with the Wainwright Company to design the plans and make the drawings and specifications for certain brewery buildings which the company was then about to erect, and to superintend their construction to completion for a commission of 5 per cent. on the cost of the building; and defendant at the very outset of the hearing conceded that the cost of said building was $220,406.

[It appeared from the facts that Mr. Jungenfeld was president of the Empire Refrigerating Company, and was largely interested therein. The De la Vergne Ice-Machine Company was a competitor in business. Against Mr. Jungenfeld's wishes, Mr. Wainwright awarded the con-

tract for the refrigerating plant to be installed in the new buildings to the De la Vergne Company. The brewery was at the time in process of erection, and most of the plans were made. When Mr. Jungenfeld heard that the contract was so awarded, he took away his plans, called off his superintendent on the ground, and notified Mr. Wainwright that he would have nothing more to do with the brewery. The defendant was in great haste to have its new brewery completed for divers reasons. It would be hard to find an architect to fill Mr. Jungenfeld's place, and the making of new plans and arrangements when another architect was found would involve much loss of time. Under these circumstances, Mr. Wainwright promised to give Mr. Jungenfeld 5 per cent. on the cost of the De la Vergne ice machine if he would resume work. Mr. Jungenfeld accepted, and fulfilled the duties of superintending architect till the completion of the brewery.

[Defendant company now refuses to pay the promised 5 per cent. on the cost of the ice machine, alleging that the promise is not enforceable at law for lack of consideration.]

GANTT, P. J. * * * Was there any consideration for the promise of Wainwright to pay Jungenfeld the 5 per cent. on the refrigerator plant? If there was not, plaintiffs cannot recover the $3,449.75, the amount of that commission. The report of the referee and the evidence upon which it is based alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms. It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do any more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new, that Jungenfeld was bound to render under the original, contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of 5 per cent. on the refrigerator plant as the condition of his complying with his contract already entered into. Nor was there even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part. Jungenfeld himself put it upon the simple proposition that "if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company," of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong. "That a promise to pay a man for doing that which he is already under contract to do is without consideration" is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it. * * *

The learned counsel for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that when Jungenfeld declined to go further on his contract, that defendant then had the right to sue for damages, and, not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract we do not think it follows that defendant is estopped from showing its promise was made without consideration. It is true that as eminent a jurist as Judge Cooley, in Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at $1.75 per ton, and afterwards, in May, 1880, declined to deliver any more ice unless the brewery would give it $3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are still of the opinion that his decision is not in accord with the almost universally accepted doctrine, and is not convincing, and certainly so much of the opinion as held that the payment by a debtor of a part of his debt then due would constitute a defense to a suit for the remainder is not the law of this state, nor, do we think, of any other where the common law prevails.

The case of Bishop v. Busse, 69 Ill. 403, is readily distinguishable from the case at bar. The price of brick increased very considerably, and the owner changed the plan of the building, so as to require nearly double the number. Owing to the increased price and change in the plans the contractor notified the party for whom he was building that he could not complete the house at the original prices, and thereupon a new arrangement was made and it is expressly upheld by the court on the ground that the change in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new or different considerations, and binding themselves thereby. What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong.

So holding, we reverse the judgment of the circuit court of St. Louis to the extent that it allows the plaintiffs below (respondents here) the sum of $3,449.75, the amount of commission at 5 per cent. on the refrigerator plant, and at the request of both sides we proceed to enter the judgment here which, in our opinion, the circuit court of St. Louis should have entered, and accordingly it is adjudged that the report of the referee be in all things approved, and that defendant have and recover of plaintiffs, as executors of Edmund Jungenfeld, the sum of $1,492.17, so found by the referee, with interest from March 9, 1887. All the judges of this division concur.

HOFFMAN v. ST. LOUIS REFRIGERATOR & COLD STORAGE CO.

St. Louis Court of Appeals, Missouri, 1906. 120 Mo. App. 661, 97 S. W. 619.

GOODE, J. This action was to recover the amount of $400, alleged to be due plaintiffs by the following contract: "St. Louis, Mo., May 30, 1905. Fred Hoffman & Co., 301 Benoist, St. Louis, Mo.—Gentlemen: We have this day made the following contract with your Mr. Hogan. In consideration of the payment to you of $400, you contract and agree so to construct the sewer you are about to build in the alley between Pine and Olive and Twelfth and Thirteenth streets, running north, that it will not affect or cause to settle our conduit that at present is located in the alley, according to the tracing we have this day given to your Mr. Hogan; and you further agree that if, in constructing this sewer, you do cause us any damage, that you will pay all losses to which we are put by reason of the damage. The $400 is to be paid to you when you have finished the sewer and the same has been accepted by the city of St. Louis. It is understood that your acceptance of this contract is on the condition that the board of public improvements shall stake out the sewer west of our conduit. If you are prepared to confirm this contract, please sign, and return to us one copy of this letter, which is issued in duplicate; you retaining the other. Yours truly, St. Louis Refrigerator & Cold Storage Co., T. S. McPheeters, President. Accepted: Fred H. Hoffman & Co. T. F. Hogan." * * *

Plaintiffs were under contract with the city of St. Louis to lay a large sewer pipe in an alley. The defendant had three conduits or pipes laid in the alley, about three feet below the surface. One of those pipes was filled with ammonia, one with ammonia gas, and the other was a vacuum, to be used if either of the others got out of order. The pipes were employed in connection with a system of refrigeration furnished to various business establishments in the city, among others the Jefferson Hotel. Defendant's pipes carried a pressure of 125 to 185 pounds pressure, and the testimony goes to show that if they sagged it would be easy for the ammonia or ammonia gas to escape. The sewer was to be constructed 17 feet below the surface of the alley and 14 feet below defendant's pipes. * * *

The position taken by defendant's counsel is that the contract in suit is unsupported by a consideration, because it imposed no greater responsibility on plaintiffs than they were under already by virtue of their contract with the city of St. Louis. We refrain from passing on the question of whether a promise to do what the promisor is already under a legal obligation to do by virtue of a prior contract between him and a third party is a good consideration for an undertaking by the promisee to compensate him for doing the thing agreed; whether or not, under those circumstances, an action will lie on the promisee's obligation. This is a question on which the authorities are in conflict. In our judgment it is not true in the case at bar that plaintiffs assumed no greater responsibility and duty to defendant regarding its pipes than they had assumed

in the contract with the city; and by every authority we have found, if the agreement in suit was more detrimental to plaintiffs than the agreement with the city was, or put them under a broader obligation, there was a consideration for defendant's undertaking to compensate them. Pollock, Contracts (7th Ed.) p. 185. The city contract bound plaintiffs to sustain, by timbers, chains, or otherwise, and so as to keep them from being injured, any underground pipes they might encounter while laying the sewer; and also provided that if any damage resulted to such pipes from plaintiffs' carelessness in laying the sewer, the damage might be repaired by the proper party, and the cost of repairing recovered of plaintiffs or their surety. Perhaps the city contract was so far intended for the benefit of defendant that defendant had a right of action on it against plaintiffs and their surety.

Granting that this is true, it is obvious that in such an action defendant could have recovered no more than the cost of repairing the pipes, and this only in the event that they were damaged by plaintiffs' failure to support them, or to use ordinary care in some other particular. But the contract in suit does not limit the recovery for loss suffered by defendant in consequence of a breach of it to the cost of repairing defendant's pipes, and neither does it restrict plaintiffs' liability to a failure to support the pipes, or to damage done to them by lack of care in some other respect. The agreement with defendant bound plaintiffs to put in the sewer in such a way that it would not affect the conduits or cause them to settle, and further bound plaintiffs to make defendant whole for all loss sustained in consequence of damage to the pipes. Such damage might have entailed a greater loss than the cost of repairs, might have suspended the use of the pipes for a time, or have caused other losses of a proximate sort, all of which would have been within the indemnity provided by the contract. Nor is it material, under the present contract, that an injury resulting to defendant's pipes from laying the sewer was not due to a failure to support the pipes, or to carelessness. Plaintiffs were under liability for damage resulting to the pipes in any way, if it was a consequence of their work. If they had supported the pipes, and had used ordinary care in laying the sewer, but nevertheless the pipes had been damaged in some way, plaintiffs still would have been liable for the loss entailed on defendant; at least, if it was possible to prevent the damage. Plaintiffs' obligation under the contract in suit was not merely to use ordinary care, and to support the pipes with timbers, chains, or otherwise. It was to put in the sewer in such a manner that defendant's pipes would not be affected by the work, and to answer for any loss occurring in consequence of their being affected. Now defendant could not contract for this higher degree of protection, and then set up lack of consideration for the promise to pay for it.

Moreover, there was testimony to show that, in order to carry out the agreement in suit, and absolutely safeguard defendant's pipes, plaintiffs were compelled to divert the sewer to the west side of the alley at considerable expense over what would have been the cost of laying it in the center of the alley, as they had a right to do under the contract with the city. This was a detriment to plaintiffs, and furnished a consideration

for the agreement, independent of the enhanced protection afforded defendant. The real issue to be tried was the one stated by defendant's counsel, namely, whether the sewer was so constructed as not to affect defendant's pipes or cause them to settle. We have read most of the numerous authorities cited by defendant, and find that none of them hold such an agreement as we have before us to be a nude pact. To do so would be to take a radical departure from the principles of contract law.

The judgment is reversed, and the cause remanded. All concur.

PARROT et al. v. MEXICAN CENT. RY. CO., LIMITED.

Supreme Judicial Court of Massachusetts, 1911. 207 Mass. 184, 93 N. E. 590, 34 L. R. A. (N. S.) 261.

[A written contract was entered into between the plaintiffs and the defendant company whereby the latter agreed to pay a specified sum for the publication of a sportsman's guide to the Mexican Central Railway. Sometime later, in the city of Mexico, one McDonald, the defendant's general passenger agent, orally promised the plaintiffs that if they would go on and complete their contract for the production of this guide book, a further sum of $3,000 would be paid them. This is a suit upon the subsequent oral agreement.]

KNOWLTON, C. J. * * * The defendant contends that there was no consideration for the promise to pay money to the plaintiffs, because they were already bound by the writing to do all that they undertook to do under the oral agreement. As a general proposition, it is settled in this commonwealth that a promise to pay one for doing that which he was under a prior legal duty to do is not binding for want of a valid consideration. Smith v. Bartholomew, 1 Metc. 276, 35 Am. Dec. 365; Com. v. Johnson, 3 Cush. 454; Pool v. Boston, 5 Cush. 219; Warren v. Hodge, 121 Mass. 106. It has often been said that the principle involved is the same that lies at the foundation of the doctrine that a promise to accept or pay a less sum in discharge of a debt for a greater amount is not binding. In connection with the general proposition see also Cabot v. Haskins, 3 Pick. 83, 92, 93; Tobey v. Wareham Bank, 13 Metc. 440–449; Lester v. Palmer, 4 Allen, 145; Harlow v. Putnam, 124 Mass. 553.

A limitation of the general proposition has been established in Massachusetts, in cases where a plaintiff, having entered into a contract with the defendant to do certain work refuses to proceed with it, and the defendant, in order to secure to himself the actual performance of the work in place of a right to collect damages from the plaintiff, promises to pay him an additional sum. This limitation is not intended to affect the rule that a contract cannot be binding without a consideration; but it rests upon the doctrine that, under these circumstances, there is a new consideration for the promise. Munroe v. Perkins, 9 Pick. 298, 20 Am. Dec. 475; Holmes v. Doane, 9 Cush. 135; Peck v. Requa, 13 Gray, 407; Rollins v. Marsh, 128 Mass. 116; Rogers v. Rogers, 139 Mass. 440, 1

N. E. 122; Allen, J., in Abbott v. Doane, 163 Mass. 433–435, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465. In Rollins v. Marsh, 128 Mass. 116–120, the court said: "The parties had made a contract in writing with which the plaintiff has become dissatisfied, and which she had informed the defendant that she should not fulfill unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforce whatever remedy he had for the breach, against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the original agreement." In such a case the new promise is given to secure the performance, in place of an action for damages for not performing, as was pointed out by this court in Peck v. Requa, 13 Gray, 407, 408.

This limitation in the application of the general rule to such facts is not recognized in England, nor in most of the states in this country. See Abbott v. Doane, 163 Mass. 433–435, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465; Leake on Cont. (4th Eng. Ed.) 434–436; Pollock on Cont. (7th Eng. Ed.) 184–186; Harriman on Cont. §§ 117–120. See also 8 Harvard Law Review, 27; 12 Harvard Law Review, 515, 521, 531; 13 Harvard Law Review, 319; 17 Harvard Law Review, 71. While it is well established in Massachusetts, the doctrine should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it. A majority of the court are of opinion that it is not applicable to the evidence in this case, and that the defendant is right in its contention that, upon the assumption that the parties were bound by the written contract, there was no consideration for the new promise of the defendant. * * *

KING v. DULUTH, M. & N. RY. CO.

Supreme Court of Minnesota, 1895. 61 Minn. 482, 63 N. W. 1105.

[Action by George R. King, as surviving partner of the late firm of Wolf & King, against the Duluth, Missabe & Northern Railway Company, on contract. From an order overruling a demurrer to the complaint, defendant appeals.]

START, C. J. This is an action brought by the plaintiff, as surviving partner of the firm of Wolf & King, to recover a balance claimed to be due for the construction of a portion of the defendant's line of railway. The complaint alleges two supposed causes of action, to each of which the defendant demurred on the ground that neither states facts constituting a cause of action. From an order overruling the demurrer the defendant appealed.

The complaint for a first cause of action alleges, among other things, substantially, that in January, 1893, the firm of Wolf & King entered into three written contracts with the president and representative of the defendant for the grading, clearing, grubbing, and construction of the roadbed of its railway for a certain stipulated price for each of the

general items of work and labor to be performed; that the firm entered upon the performance of such contracts, but in the latter part of February, 1893, in the course of such performance, unforeseen difficulties of construction involving unexpected expenses, and such as were not anticipated by the parties to the contracts, were encountered. That the firm of Wolf & King found that by reason of such difficulties it would be impossible to complete the contracts within the time agreed upon without employing an additional and an unusual force of men and teams, and at a loss of not less than $40,000 to them, and consequently they notified the representative of the defendant that they would be unable to go forward with the contracts, and unable to complete or prosecute the work. Thereupon such representative entered into an agreement with them modifying the written contracts, whereby he agreed that if they would "go forward and prosecute the said work of construction, and complete said contract," he would pay or cause to be paid to them an additional consideration therefor, up to the full extent of the cost of the work, so that they should not be compelled to do the work at a loss to themselves. That in consideration of such promise they agreed to forward the work rapidly, and force the same to completion, in the manner provided in the specifications for such work, and referred to in such contracts. That in reliance upon the agreement modifying the former contracts, and in reliance upon such former contracts, they did prosecute and complete the work in accordance with the contracts as so modified by the oral agreement, to the satisfaction of all parties in interest. That such contracts and the oral contract modifying them were duly ratified by the defendant, and that the actual cost of such construction was not less than $30,000 in excess of the stipulated amount provided for in the original written contracts.

It is claimed by appellant that the complainant shows no consideration for the alleged promise to pay extra compensation for the work; that it is at best simply a promise to pay the contractors an additional compensation if they would do that which they were already legally bound to do. The general rule is that a promise of a party to a contract to do, or the doing of, that which he is already under a legal obligation to do by the terms of the contract is not a valid consideration to support the promise of the other party to pay an additional compensation for such performance. * * * In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. * * * If the allegations of the complaint, when taken together, are in legal effect simply that the contractors, finding by the test of experience in the prosecution of the work that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to proceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to have been sustained as to the first cause of action.

It is claimed, however, by the respondent, that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several states, and at least approved in our own, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform his contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and the substitution of a new one. Munroe v. Perkins, 9 Pick. (Mass.) 305, 20 Am. Dec. 475; Bryant v. Lord, 19 Minn. 396 (Gil. 342); Moore v. Detroit Locomotive Works, 14 Mich. 266; Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122.

The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement, is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby.

There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. * * *

It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. But where the party

refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit. * * *

What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. * * * The cases of Meech v. City of Buffalo, 29 N. Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and Michaud v. MacGregor [decided at the present term] 61 Minn. 198, 63 N. W. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there, by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule.

Do the allegations of fact contained in plaintiff's first alleged cause of action bring his case within the exception? Clearly not; for eliminating all conclusions, and considering only the facts alleged, there is nothing to make the case exceptional, other than the general statement that the season was so extraordinary that in order to do the stipulated work it would require great and unusual expense, involving a large use of powder and extra time and labor for the purpose of blasting out the frozen earth and other material which was encountered. What the character of this material was we are not told, or what the other extraordinary conditions of the ground were. The court will take judicial knowledge of the fact that frozen ground on the Missabe Range, where the work was to be performed, in the month of February, is not unusual or extraordinary. It was a matter which must have been anticipated by the parties, and taken into consideration by them when this contract was made. The most that can be claimed from the allegations of the complaint is that the contractors had made a losing bargain, and refused to complete their contract, and the defendant, by its representative, promised them that if they would go forward and complete their contract it would pay them

an additional compensation, so that the total compensation should be equal to the actual cost of the work. * * *

So much of the order appealed from as overruled the defendant's demurrer to the supposed first cause of action in the plaintiff's complaint must be reversed. * * *[3]

SECTION 6.—PART PAYMENT OF DEBT AS CONSIDERATION FOR A RELEASE

Under the rule discussed in the previous section, the simple payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt, for it is doing no more than the debtor is already bound to do, and is therefore no consideration for the creditor's promise to forego the balance. This promise, or release, as it is called, being without a consideration, constitutes no bar to a subsequent suit by the creditor against the debtor to recover the remainder of the debt. If, for example, a person owes another $1,000, and the creditor offers to take $500 in full for the debt, promising not to sue for the balance, the payment of the $500 will not prevent the creditor afterwards recovering the other $500, in spite of his promise.

Although apparently unjust to refuse to give effect to such a promise or release, freely and voluntarily made upon the payment of a less sum than was actually due, yet it stands upon the same principle which denies the enforcement of any promise lacking a consideration to support it. However, the courts have limited the scope of the doctrine wherever possible. As Lord Blackburn said, in Foakes v. Beer,[4] while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk, or robe, etc., in satisfac-

[3] In accord: Linz v. Schuck, 106 Md. 220, 67 A. 286, 11 L. R. A. (N. S.) 789, 124 Am. St. Rep. 481, 14 Ann. Cas. 495 (1907); Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 A. 209 (1887).

Where the owner orders changes in the character, location, or amount of work to be done by the contractor, and a new promise is made to pay additional compensation, or where for any reason due to the conduct of the owner unexpected difficulty or expense is incurred, there is ample consideration for the new promise, though no express rescission of the original contract was made.

Note: Rescission of the original contract may be express, or implied from the conduct of the parties; although the mere entering into a subsequent agreement of itself will not be sufficient. But a cancellation of the original contract upon its face, or by express language contained in the new contract, or by a demand and surrender of possession to the plaintiff of defendant's copy of the original contract, will be enough to show that the intention of the parties was a complete substitution of the new contract for the old. Schwartzreich v. Bauman-Basch, 105 Misc. Rep. 214, 172 N. Y. S. 683 (1918).

[4] L. R. 9 App. Cas. 605 (1884).

tion, is good," regardless of the amount of the debt; and also he further said "that payment and acceptance of a parcel before the day of payment [due date] of a larger sum would be a good satisfaction in regard to the circumstance of time." It has also been held that the giving of a note for a lesser sum, with a chattel mortgage to secure payment, would constitute a good consideration for the release of the whole debt, for here the creditor received additional benefit in the new rights and remedies granted by the mortgage.[5]

The method used in practice to obviate the effect of the rule is for the debtor to require the creditor to sign a release of the whole debt *under seal.* Since a promise under seal requires no consideration,[6] such a release is valid.

This doctrine that payment of a lesser sum is no consideration for a release of the whole debt applies only to cases where the debt is *liquidated.* A liquidated claim or debt is one in which the amount due is undisputed. If, on the other hand, a bona fide disagreement exists between debtor and creditor as to the amount of the debt, it is said to be *unliquidated.*

TANNER v. MERRILL.

Supreme Court of Michigan, 1895. 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687.

HOOKER, J. The defendants appeal from a judgment recovered against them at circuit. They are lumbermen, and the plaintiff worked for them at Georgian Bay, his transportation from Saginaw to that place having been paid by them. When he quit work, a question arose as to who should pay this under the contract of employment, and defendants' superintendent declined to pay any transportation. The plaintiff needed the money due him to get home, and showed a telegram announcing the illness or death of his mother, and said that he must go home, to which the superintendent replied that "he did not pay any man's fare;" whereupon a receipt in full was signed, and the money due, after deducting transportation, was paid. The plaintiff testified that they had no dispute, only he claimed the fare and the superitendent refused to allow it. * * *

It is urged upon behalf of the plaintiff that receipts are always open to explanation, and that there is no consideration to support the acceptance of a portion of a valid claim as full payment. The cases which counsel cite do not support the broad contention of plaintiff's counsel, which would seriously derange business affairs if it should be sustained. The doctrine that the receipt of part payment must rest upon a valid consideration to be effective in discharge of the entire debt is carefully limited to cases where the debt is liquidated, by agreement of the par-

5 Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710 (1891).

6 See post, § 9.

ties or otherwise, which was not the case here. It was in dispute. * * * In Marion v. Heimbach, 62 Minn. 215, 64 N. W. 386, the court say: "But where the claim is unliquidated, it would seem to be true that if the creditor is tendered a sum less than his claim, upon the condition that, if it is accepted, it must be in full satisfaction of his whole claim, his acceptance is an accord and satisfaction." * * * The important fact to ascertain is whether the plaintiff's claim was a liquidated claim or not. If it was, there was no consideration for the discharge. If not, the authorities are in substantial accord that part payment of the claim may discharge the debt, if it is so received.

Upon the undisputed facts, the claim of the plaintiff, as made, was not liquidated. It was not even admitted, but, on the contrary, was denied, because the defendants claimed that it had been partially paid by a valid offset. While the controversy was over the offset, it is plain that the amount due the plaintiff was in dispute. If so, it is difficult to understand how it could be treated as a liquidated claim, unless it is to be said that a claim may be liquidated piecemeal, and that, so far as the items are agreed upon, it is liquidated, and to that extent is not subject to adjustment on a basis of part payment. Cases are not numerous in which just this phase of the question appears. This would seem remarkable, unless we are to assume that, in calling a claim unliquidated, the courts have alluded to the whole claim, and have considered that, where the amount is not agreed upon, the claim as a whole is unliquidated, and therefore subject to adjustment. If this is not true, no man can pay an amount that he admits to be due without being subject to action whenever and so often as his creditor may choose to claim that he was not fully paid, no matter how solemn may have been his acknowledgment of satisfaction, so long as it is not a release under seal. * * *

The judgment must be reversed. No new trial should be ordered.[7]

SECTION 7.—SUBSCRIPTION CONTRACTS

BEATTY'S ESTATE v. WESTERN COLLEGE OF TOLEDO, IOWA.

Supreme Court of Illinois, 1898. 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242.

[In the matter of the estate of Mary Beatty, deceased, the Western College of Toledo obtained a judgment against Jacob Miller and another, executors, and they appealed to the appellate court, which affirmed the judgment, and they again appeal]. * * *

[7] The dissenting opinion of Montgomery, J. (concurred in by McGrath, C. J.), is omitted.

The note, filed as a claim against the estate of the deceased, is as follows:

"$7,000.00. Dover, Ill., Dec. 9, 1887.

"In consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition, I promise to pay to the order of the treasurer of Western College, of Toledo, Iowa, for the erection of the Ladies' Boarding Hall of said college, on or before the first day of December, 1910, the sum of seven thousand dollars, without interest: provided, that in the event of my death before the maturity of this note it shall become then due. Mary Beatty. P. O., Dover; County, Bureau; State, Ill. Witness: H. H. Maynard, W. M. Beardshear." * * *

The appellee is a college located at Toledo, in the state of Iowa, and is under the management of the denomination known as the United Brethren in Christ. Prior to December, 1887, the college had commenced the erection of a building to be known as the "Ladies' Boarding Hall" of the college and had expended upon the stone foundation thereof the sum of $2,000, donated to it by a man in Ohio, named Dodds. In December, 1887, representatives of the college appealed to the deceased, Mary Beatty, at her home in Dover, Ill., for a donation of $10,000, to complete the erection of said hall, she being a member of the denomination to which the college belonged. On December 9, 1887, she was visited by H. H. Maynard, a soliciting agent of the college, and W. M Beardshear, president of the college. On December 3, 1887, she had given to Maynard $500 in cash, a note for $1,500, payable on or before December 3, 1890, and a note for $5,000 of like tenor with the note for $7,000 above set forth. On December 9, 1887, she destroyed the $5,000 note, and gave to Maynard and Beardshear the $7,000 note above described, and also a short-time note for $1,000.

MAGRUDER, J. * * * It is contended, however, that the note for $7,000, filed as a claim in this case was executed and delivered without any valid consideration to support it. The note recites upon its face that the maker thereof promises to pay "in consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition." * * * Whether this note, upon its face, imports a consideration or not, it is well settled that proof may be introduced to show the facts in regard to the consideration of the note. The evidence tends to show that the deceased availed herself of the privilege, specified in the note, of sending one student four years free of tuition. The certificate embodying such privilege was issued to Mrs. Beatty, and was made use of by a female student upon the order of Mrs. Beatty. We do not deem it necessary, however, to decide whether or not the privilege specified upon the face of the note, and the use of it made by the deceased, constituted a valid consideration. The proof tends to show that the note for $7,000 was a gift or donation to the college. Such a note partakes of the nature of a voluntary subscription to raise a fund or promote an object. It is well settled that a promissory note without consideration, and intended as a gift to the payee by the maker thereof, is but a promise to make a gift in the

future, and is not enforceable. As a gift it is always revocable until it is executed, and is not executed until it is paid. "The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon." Pratt v. Trustees of Baptist Soc. of Elgin, 93 Ill. 475, 34 Am. Rep. 187. In Blanchard v. Williamson, 70 Ill. 647, we said (page 652): "If a party delivers his own promissory note as a gift, it is but a promise to pay a sum certain at a future day, and we are not aware such a promise can be enforced, either at law or in equity. It could not be enforced against the maker in his lifetime, and his representatives could defend against it on the ground there was no consideration." * * * But, while such a note, amounting to a mere gift, is open to the defense of a want of consideration, yet that defense cannot be made to it if money has been expended, or liabilities have been incurred, in reliance upon the note. If money has been expended, or liabilities have been incurred, which, by legal necessity, must cause loss or injury to the person so expending money or incurring liability, if the note is not paid, the donor or maker thereof is, in good conscience, bound to pay; and the gift will be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking. We have said: "It is the expending of money, etc., or incurring a legal liability on the faith of the promise, which gives the right of action; and without this there is no right of action." Pratt v. Trustees of Baptist Soc. of Elgin, 93 Ill. 475, 34 Am. Rep. 187. * * *

There was evidence in the case at bar tending to show that the appellee expended money in the construction of the building known as "Ladies' Boarding Hall," upon the faith of the promise made by the deceased as embodied in the note for $7,000. * * * It makes no difference that she did not advance any money upon that note, but preferred to donate $6,700, and take back certificates, which secured to her the payment of annuities thereon during her life. The instructions, given by the court to the jury, required them to find whether or not the college, during the lifetime of Mary Beatty, entered into a contract to build and erect, and did build and erect, and expend moneys and incur liabilities in building and erecting, the "Ladies' Boarding Hall" on the faith and strength of the note for $7,000. The question as to the expenditure of such moneys and the incurring of such liabilities upon the faith and strength of the note was a question of fact, which was submitted to the jury by the instructions. * * * In the present state of the record, we are obliged to assume that the jury found in favor of such expenditures of money and incurring of such liabilities on the part of the appellee. This being so, the appellee is entitled to its right of action, even if the note for $7,000 was without consideration before it was thus acted upon. Upon this branch of the case, therefore, we are of the opinion that the courts below committed no error in holding the claim of appellee to be a valid claim. * * *

Judgment affirmed.

SECTION 8.—PAST CONSIDERATION

IN GENERAL.—The general rule is that a past consideration will not support a subsequent promise. A past consideration is some benefit rendered in time past, for which the person who has received the benefit at a later time promises to pay. In reality a "past consideration" is no consideration at all, since there is no benefit or detriment incurred in exchange for the promise at the time it is made. Thus, where a company, which had previously sold a steam shovel to a contractor without any warranty, afterwards promised that it was free from all defects of construction, and that, if any breakage occurred within three months, the company would make it good, it was held that the promise was not binding for lack of consideration. A familiar example of past consideration is where a bank loans money to A upon his note, and then, before maturity, asks B to indorse the note. The promise of B to pay the note if A does not is not supported by any consideration, and B would not be liable on his indorsement. The only consideration in the case was the loaning of the money, and, since that occurred previous to the indorsement, the consideration is past.

EXCEPTION TO THE RULE.—A so-called exception to the rule that a past consideration will not support a promise is found in those cases in which a subsequent promise is made to pay a debt barred by the statute of limitations or a bankruptcy decree. But here the consideration is not in reality past, but present. The theory is that the statute or the bankruptcy decree does not extinguish the original debt, but only bars the creditors' remedy thereon; also that, since these rules of law are meant for the debtor's advantage, he may "renounce their benefit if he choose," and, if he promises to pay the debt, the promise is a waiver or renunciation of the bar of the statute or the bankruptcy, and that therefore the original debt stands forth as the consideration for the subsequent promise to pay.

Some courts enforce the promise in this class of cases on the theory of "the moral obligation created by the subsequent promise"; but this line of reasoning leads either to the principle that moral obligation is consideration, which all courts deny, or to the proposition that these cases are an exception to the whole doctrine of consideration, an equally untenable position. It is simpler and more logical to enforce these promises on the theory that the promise waives the bar of the statute, which stands between the original debt and the subsequent promise to pay it, and, the bar being now down, the debt forms a present consideration.

SECTION 9.—SEALED INSTRUMENTS

As we have seen, a promise is a legal promise—that is, one which creates a legal right and its corresponding obligation—only if it is supported by a consideration. The law does not enforce all promises; consideration is made the test, or dividing line between those promises enforceable at law and those not so enforceable.

Promises under seal, however, are an exception to the rule, and are enforceable without a consideration. This is often accounted for on the ground that their solemnity imports a consideration, and yet this is historically inaccurate, for the enforceability of sealed promises far antedates the beginnings of the doctrine of consideration. The sealed contract derives its validity solely from its form, and the courts refuse "to go behind the seal" into any question of consideration. So a promise to make a gift, if in writing and under seal, is enforceable.

The seal originally was wax, with an impression, attached to the paper; but this is no longer essential. The impression may now be made on the paper itself, and may consist of the printed or written word "seal," or a scroll or scrawl sufficiently indicating that the party signing intended to execute a formal contract.

In some states, statutes have abolished all distinctions between sealed and unsealed instruments,[8] and here the promise, though under seal, must be supported by a consideration.

[8] California, Kentucky, Kansas, Indiana, Iowa, Nebraska, Washington, New York, and New Jersey.

CHAPTER 3

CAPACITY OF PARTIES

SECTION 1.—IN GENERAL

The third requisite of a contract is that the parties thereto must be competent to bind themselves upon an agreement. Thus far we have been dealing with the contract itself, ascertaining the elements essential to form an agreement, and answering the further question as to what agreements the law will enforce. Agreement by offer and acceptance, and consideration to support it, are necessary to every contract; but more than this is required. The parties must be capable of binding themselves upon a legal obligation.

Certain classes of persons the law deems incapable of entering into a binding agreement, and it protects such persons against their relative inability to guard their own interests by declaring their contracts voidable at their option. These are: (1) Insane persons; (2) intoxicated persons; (3) infants; and (4) corporations.

Insane persons are incapable of entering into a binding contract. If there has already been a legal adjudication of insanity prior to the agreement, the contract is considered as void. If the party had not yet been adjudged insane, proof of actual insanity at the time will render the contract voidable, at the option of the insane person or his representatives. In the case of necessaries, however, the law implies a contract on the part of the lunatic to pay their reasonable value.

A contract entered into by an intoxicated person will be declared void, upon proof that at the time of the agreement the condition was such as to render the party devoid of reason to the extent that he was ignorant of his action. A state of intoxication, such that the party was unable to judge as to his best interests merely, will not, in the absence of fraud, be sufficient to avoid the contract.

SECTION 2.—INFANTS

All persons, male and female, under the age of twenty-one years, are, at common law, infants or minors. By statute in some states [1] females are of age at eighteen. The law declares the age of twenty-one as maturity for no better reason than that the line must be drawn somewhere.

Since the human being attains mental and physical maturity only by slow growth, gaining the ability to cope with others in the protection of his own interests and property only through long experience, it is necessary that the law afford some sort of protection during the years of minority. For the purpose of shielding the infant, the law declares that his contracts shall be voidable at his option. The legal effect, then, of an infant's contract, is that it is binding upon both parties until the infant, either before or after attaining his majority, avoids it. The other party to the contract, not being himself under a disability, is bound if the infant chooses to hold him.

DISAFFIRMANCE.—An infant may, as a general rule, disaffirm any contract into which he has entered; but, until he does so, the contract may be said to exist, capable of being made absolute upon his affirmance after majority, or void by disaffirmance.

Disaffirmance may be express, or it may be implied from acts inconsistent with the existence of the contract. So, if an infant sell land or goods to A, and then later conveys title to the same property to B, this subsequent act will be deemed a disaffirmance of the first contract. The filing of suit to recover back money, paid on a contract or sale while an infant, is a disaffirmance. So, also, on an executory contract, an infant may neglect to disaffirm until sued, and then may plead his infancy as a complete defense; and such an act will amount to disaffirmance.

In order to disaffirm, the infant must render back to the other party the consideration he has received under the contract, if he still has it. But, if he has lost or spent it, nevertheless he may still disaffirm. For example, if an infant buys an automobile and later wrecks it, he may thereafter disaffirm the contract of sale and recover the money he has paid, upon tendering back the remains of the car. But, if there is nothing left of it, he may yet disaffirm and get back his money. "The infant is not required, as is an adult, to restore the opposite party to his former condition; for, if he has lost or squandered the property received by him in the transaction that he rescinds, and so is unable to re-

[1] In Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Vermont, and Washington, women attain their majority at 18.

store it, he may still disaffirm the contract and recover back the consideration paid by him without making restitution; for, if it were otherwise, his privilege would be of little avail as shield against the inexperience and improvidence of youth. But, when the property received by him from the adult is in his possession, to permit him to rescind, without returning it, or offering to do so, would be to permit him to use his privilege as a sword, rather than as a shield." [2]

As to the time within which an infant may disaffirm, it may be at any time during infancy, or within a reasonable time after he comes of age. Contracts for the sale of land cannot be disaffirmed during infancy.

RATIFICATION.—Just as a person cannot make a contract by which he may be bound, during infancy, so, also, he cannot bind himself by a ratification of any such contract, until he comes of age.

Ratification, like disaffirmance, may be express, or it may be implied from conduct inconsistent with the idea of disaffirmance. Exercising acts of ownership, such as selling the property bought during infancy, or retention and beneficial use of it for a reasonable time after majority, will amount to ratification.

NECESSARIES.—An infant is, however, liable for the reasonable value of necessaries furnished him. The purpose of the rule in declaring the disability of an infant is his protection; but to extend the rule to those things essential to his existence and well-being would be to change protection to deprivation. For, if he could not bind himself to pay for necessaries, people might not sell them to him on other than a cash basis, and he might suffer in consequence. Therefore the law provides that an infant is bound for necessaries furnished.

Here is, however, no exception to the rule that an infant's contracts are voidable at his option. The legal obligation of an infant to pay for necessaries furnished is not upon any theory of contract between the parties, but from a quasi contractual relation arising by operation of law. Thus the necessaries must be actually furnished, the benefit received, before any liability is incurred; and an infant cannot be liable on an *executory* contract even for necessaries. Also the liability is to pay, not the agreed price, but only the reasonable value, of the necessaries furnished.

Necessaries are such things as are suitable to the condition in life of the infant, and to his actual requirements at the time of delivery. So the term includes whatever is reasonably needed for the infant's subsistence, such as food and lodging; for his health, such as medicine, doctors, and nurses; for his comfort, such as clothes; and for his education. A college education is not a necessary, except under exceptional circumstances of wealth and station in society; but a common-school

[2] Lemmon v. Beeman, 45 Ohio St. 505, 15 N. E. 476 (1888).

education, and even a trade-school education, are deemed necessaries. The question as to what are necessaries can be answered only in view of the circumstances of the particular case, for it depends upon the station in life of the infant.

INFANT'S LIABILITY FOR MISREPRESENTATION.—Although an infant is not liable upon his contracts, he is liable for his torts. A tort is a legal wrong, growing out of the violation of one of the primary rights. Where an infant falsely represents that he has attained his majority, in order to induce another person to sell him goods on credit, he is guilty of the tort known as deceit. Although even under these circumstances the infant may disaffirm his contract, and may escape all liability under it, yet he will be liable in a tort action for deceit, for all damages arising out of his misrepresentation.

SECTION 3.—CORPORATIONS

The capacity of a corporation to enter into binding contracts is limited to those powers expressly or impliedly granted by the state. A corporation is a creature of the law, and the limits of its contractual capacity are the powers granted to it by law. The express grant of power is to be found in the charter and in the act of incorporation under which it was organized. The implied powers are those reasonably incidental to the accomplishment of the object for which the corporation was created.

As to all acts beyond the powers expressly or impliedly granted, the corporation lacks legal capacity; that is, it lacks ability legally to bind itself. Contracts involving such acts are not enforceable. A person dealing with any corporation is chargeable with notice of the limits of its powers, and if those limits are exceeded the contract is said to be *ultra vires* and void.

To no one more than to the contractor and builder is the legal incapacity of corporate persons a matter of supreme importance. Having entered into the contract and performed his part by the completion of the building, upon his request that the corporation pay the agreed price, the contractor may be met with the defense that the contract was one beyond the powers of the corporation, and therefore *ultra vires* and void. Any stockholder may raise the objection, or, in the case of a public corporation, any citizen; and the courts will thereupon restrain the corporation from paying out the money due upon the contract.

The effect of corporate incapacity in the case of a private corporation differs from that in the case of a public corporation. As to a private corporation, the settled law is as follows: If the *ultra vires* contract is

executory on both sides, it is not enforceable by either. But, if the corporation has had the benefit of performance by the other party, some courts invoke the doctrine of equitable estoppel to prevent the corporation from pleading the defense of *ultra vires,* while other courts, which refuse this method of indirect enforcement of the contract, hold the corporation liable for the reasonable value of the benefit it has received, on the theory of quasi contract or quantum meruit.

But, in the case of a public corporation, upon a contract which is beyond its legal capacity there can be no recovery on any theory. Cities, towns, counties, incorporated villages, school districts, sanitary districts, etc., are examples of public corporations. Any contract in excess of the powers granted them by the state are void; and, furthermore, there cannot be indirect recovery on a quasi contractual theory, nor any estoppel to prevent the defense of *ultra vires.* The contractor dealing with a public corporation on any contract which the corporation lacks the capacity to make, will suffer the entire loss.

John Cassan Waite, a pioneer in the field of engineering law, has said:

"In every case in which a contractor is contemplating entering into an agreement with a corporation, he should satisfy himself first that the officers or agents acting are the proper persons to enter into the contract on behalf of the corporation, that they are acting within the limits of their powers, and that the corporation itself has the power to enter into the contract proposed. He must take notice of the lawful limits of the corporation's capacity, and ascertain whether the contract would transcend the express or implied powers granted by the charter.

"Particularly is this true in dealing with a municipal corporation, for here, if the contract is *ultra vires,* the contractor will not only be unable to recover on the contract, but he will even be precluded from getting back the value of his labor and materials on a quantum meruit, and will lose everything he has put into the structure."[3]

GEORGE v. NEVADA CENT. R. CO.

Supreme Court of Nevada, 1894. 22 Nev. 228, 38 P. 441.

[Action by plaintiff, a mining engineer, upon a contract for services rendered the defendant, a railroad corporation, in investigation of certain mines in the Reese River mining district. Judgment below for defendant, and plaintiff appeals.]

BELKNAP, J. * * * Among other things it was found that the principal business of the defendant [railroad] was the transportation of ores from the Austin mining district, and that this business became unprofitable * * * because of the limited output of the mines. It ap-

[3] Waite, Engineering and Architectural Jurisprudence, p. 36.

peared to some, at least, of the defendant's officers that with a more active management of the mines the traffic of the defendant would be increased. Accordingly the superintendent of the company, Mr. Hinchcliffe, by the authority of Mr. Hatch, the president, employed the plaintiff to examine the mines known as the "Manhattan mining property," and to report upon them, in the expectation that a change in their management and control could be brought about. * * *

The fact was also found that the defendant was vested with the power conferred by the statute of the state relative to railroad corporations, and that neither the president nor secretary was authorized to employ the plaintiff in the service in which he was engaged, and also that no action was ever taken by the board of directors in the matter.

Section 843, Gen. St., commits the management of corporations to a board of directors. The section is as follows: "The directors of any railroad company heretofore incorporated [under] this act * * * shall, for and on behalf of such company, * * * make and execute contracts, of whatever nature or kind, fully and completely to carry out the objects and purposes of such corporation, in such way and manner as they may think proper, and exercise generally the corporate powers of such company."

A corporation can exercise no power not granted to it by the legislature. In Thomas v. Railroad Co., 101 U. S. 82, 25 L. Ed. 950, this principle was stated as follows: "We take the general doctrine to be in this country * * * that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." In Davis v. Railroad Co., 131 Mass. 259, 41 Am. Rep. 221, it is said: "A corporation has power to do such business, only, as it is authorized by its act of incorporation to do, and no other. It is not held out * * * as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, * * * but with such, only, as its charter confers. If it exceeds its chartered powers, * * * those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation. Every person who enters into a contract with a corporation is bound, at his peril, to take notice of the legal limits of its capacity." * * *

The defendant corporation is authorized by the statutes of the state to construct and maintain a railroad. [To employ persons to make reports upon mines is outside the purposes and objects of a railroad corporation, and consequently there can be no recovery upon any such contract. In this case, not only was the contract beyond the power of the

corporation, but also it was beyond the powers of the agents who assumed to make it. The last must follow necessarily from the first proposition in any case; but here it is plain that only the board of directors were empowered to bind the corporation on a contract.]

It is claimed that the contract was an executed contract, and that the defendant, having received its benefits, cannot defend upon the ground of want of authority to make it. If the company had received the benefits of the contract, the question we should have to consider would be different from the one now before us. [Here the court indicates that in such case it would apply the doctrine of estoppel to prevent the company from pleading the defense of ultra vires.] But the fact is that the report never came into the possession of the corporation, as such. Several of its officers used it, but their use was unauthorized, and never ratified by the corporation. The findings of fact on this point show "that the stockholders of said defendant did not personally know of the making of said contract, and the same was never presented to them for their action, other than said Hatch and Hinchcliffe, and no action was ever taken thereon by the board of directors of said defendant."

Judgment affirmed.[4]

ZOTTMAN v. CITY AND COUNTY OF SAN FRANCISCO.

Supreme Court of California, 1862. 20 Cal. 96, 81 Am. Dec. 96.

[Action against the City of San Francisco upon a contract alleged to have been made with it. It appeared that the council of the city had authorized certain improvements to be made under a contract with the plaintiff. After the work was started, it was discovered that changes were necessary involving extra expense, and a special committee, appointed to look after the work, together with other city officials, directed the changes to be made. These changes were known to all the members of the legislative body of the city and were a matter of general approval. They did not, however, take any formal action upon it. The city paid the bill for the original contract but now refuses to pay for the "extras." At the trial the defendant had judgment.]

FIELD, C. J. [After deciding that the authority to make such contracts was vested in the legislative body of the city, and that it could make such contracts only by ordinances:] Individual members of the common council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this; the common council even could not by

[4] The concurring opinion of Bigelow, J., is omitted.

any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general and applies to the corporate authorities of all municipal bodies; where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale; indeed there is no power to sell in any other way. Aside from the mode designated there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications. Thus in Head v. Providence Insurance Co., 2 Cranch, 156, 2 L. Ed. 229, Mr. Chief Justice Marshall, in speaking of bodies which have only a legal existence, says: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe the mode, or the instrument no more creates a contract than if the body had never been incorporated." See McCracken v. City of San Francisco, 16 Cal. 619; Farmers' Loan & Trust Co. v. Carroll, 5 Barb. (N. Y.) 649; New York Firemen's Insurance Co. v. Ely, 5 Conn. 568, 13 Am. Dec. 100.

As a necessary consequence flowing from these views, a contract not made in the prescribed mode, cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instances; and a power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes a sale of city property only at a public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing originally. * * * "By the charter the power is limited and it is a familiar rule that corporations can only bind themselves by contracts they are expressly or impliedly authorized to make.

"It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose

to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard. [McCracken v. City of San Francisco, 16 Cal. 619.] An individual having power to make a contract may ratify or affirm it when made by one who without authority assumes to be his agent, but if the individual have himself no such power, he can no more bind himself retroactively to its performance by affirmance or ratification than he could have done so prospectively in the first instance. The power to ratify ex vi termini implies the power to have made the contract, and the power to ratify in a particular mode implies the power to have made the contract in that manner." * * *

Judgment affirmed.[5]

TURNEY v. TOWN OF BRIDGEPORT.

Supreme Court of Errors of Connecticut, 1887. 55 Conn. 412, 12 A. 520.

STODDARD, J. The town of Bridgeport, at a special town meeting, held February 16, 1880, voted "that J. S. Hanover, Nathaniel Wheeler, E. W. Marsh, and George C. Waldo be, and they are hereby, appointed agents of the town to obtain plans, specifications, and estimates for the building of a public schoolhouse, and, when the same shall have been approved by the school and building committee, to contract for the erection thereof, on the site selected by the town, at a cost not to exceed the sum of $55,000, and that the town appropriate said sum to defray the expenses of erecting the same." By this resolution of the town, the appropriation to build the schoolhouse was restricted to the sum of $55,000, and the power of the committee to expend money was limited to that sum named in the vote.

In Connecticut towns are territorial subdivisions of the state, created at the will of the legislature, for the more convenient administration of local, public, and governmental affairs. They have no powers except those conferred by express enactment, or necessarily implied, to carry into effect the object and purposes of their being. Agents of towns have no general authority. Their powers are measured and limited by the express language in which authority is given, or by the implication necessary to enable them to perform some duty cast upon them by express language. Persons dealing with towns through the medium of committees and other agents of towns must, at their peril, take notice of the scope and measure of the powers of such committees and agents. Towns are quasi corporations, and in their characteristic qualities radically differ from trading and commercial corporations as to liability arising from acts of agents. And in some essentials towns differ from ordinary municipal corporations, whose chartered powers are conferred at the request of the inhabitants, and to effectuate in some degree and to some extent purposes not public or governmental. Pub-

[5] The concurring opinion of Cope, J., is omitted.

lic duties and obligations are cast upon towns by the legislative power, without reference to the will of the inhabitants of the town. Every inhabitant of the town is a member of the quasi corporation, and his individual property may be levied upon to satisfy executions against the town. Webster v. Harwinton, 32 Conn. 131. * * *

The plaintiff contracted with the committee named by a written contract, wherein the resolution of the town was recited in full; and he contracted to build and finish the schoolhouse according to certain plans and specifications, except the heating, ventilation, and plumbing, for the sum of $42,250. The plaintiff either knew as matter of fact the amount of the contract price for the part of the work excepted in his bid, or at least was put upon inquiry, and could easily have ascertained the amount, and must be treated as contracting with reference to the actual contract expense of such excepted parts of the work. The plaintiff has recovered a verdict for substantially all the difference between the contract prices and the amount appropriated, and is in nowise damaged by the claimed erroneous rulings, unless he has a right to recover of the town beyond the amount so appropriated. He places his right to recover a sum above the sum appropriated upon two general theories: First, that the committee in question, or the board of education, or both bodies acting in reference to the matter, have made another and different contract with him, by which they promised, and bound the town, to pay a sum above the $55,000 for the construction of the schoolhouse, and that, acting under that new and different contract, he has expended about $26,500 above his original contract price; and, second, that the town, by its action, has ratified and confirmed the acts of its agents in thus attempting to create such additional obligation.

We think it clear, beyond discussion, that when a town, by legal vote, limits the amount of an appropriation for a particular and specified purpose, and by the same vote appoints a committee to carry that purpose into effect, such committee has no implied authority to involve the town in any additional expense whatever. This result must follow from the political and peculiar character of the town corporation, and the fact that the property rights and interests of each inhabitant are involved in every contract made by or in behalf of the town. The town cannot contract except by vote passed at a legal town meeting, or in strict accordance with the positive provisions of some statute. Precedents in relation to the liabilities of trading and commercial companies, and even relating to many municipal corporations, have no real bearing. The action of the town, in thus acting specifically upon the subject-matter, divested the committee and the board of education of all power and authority except to contract in precise conformity to the vote of the town. The claims of the plaintiff in this particular would, if upheld, subvert the whole system of town supervision of school matters, and leave the individual inhabitant of the town at the mercy of combinations between contractors and committees of towns.

Assuming that the plaintiff made an agreement with some persons or committee claiming to represent the town in that particular, under which

agreement he expended some $26,000 or $27,000 more than the contract price, the plaintiff says that the defendant town accepted the results of that agreement; accepted and retained the fruits of the bargain, and the benefits of the plaintiff's labor and property expended under such attempted contract; and ratified and confirmed the acts of the committee in various ways. * * * Again, it is said that the committee on building, and the school committee, on behalf of the town, took possession of the building after it was finished, furnished it, and used it for school purposes, and that the town has in this way the benefit of the plaintiff's labor and materials to the amount claimed in the complaint wholly unpaid for. It is admitted that the building was erected upon a lot owned by the town. The plaintiff knew this fact when he built the structure. The plaintiff made no sort of claim upon the town for any payment beyond the amount appropriated until long after the building was accepted and in use as a school building, and the town had paid the plaintiff his contract price, and something for extras. There is nothing to show that the committee recognized the plaintiff's right to recover beyond that sum. Even if the town had received notice that the plaintiff claimed beyond the appropriation before the building was used as a school building, we think it plain that the town had a right to take and continue the possession of the building without incurring liability by that act. The town had no election in the premises. The building had been erected upon a lot owned by the town, for the specific purposes of a schoolhouse lot and building. The town had instructed its committee to make a contract, with a certain definite limitation as to the amount of the cost of the building, and the plaintiff knew perfectly well that the committee neither directly nor indirectly had any power to contract beyond the letter of that vote. The town had paid a large sum for the lot, and a large sum to the plaintiff. Under the circumstances, it is impossible for us to say that this public, political corporation could not use this building for a public schoolhouse because the plaintiff claimed that he had entered into an agreement with the building committee in conscious disregard of the restraints and limitations of their power. There is no authority for the plaintiff's position. * * *

We have touched only generally upon one controlling feature of this case. The rules of law declaring that an agent of a town must pursue his authority strictly; that, if he goes beyond his written authority, his act is not valid; that persons dealing with such agents must look to the corporate act of the town as the source and limit of the powers of the agent; that any claimed ratification of previously unauthorized acts of such agent must be done by the town in a lawful manner, and, as a rule, directly, and not by implication, and must be made with full knowledge of all material facts; and that no estoppel in pais can be created, except by conduct on the part of the town which the person claiming the estoppel has the right to, and does in fact, rely on—these are essential to the due and orderly administration of our local public affairs, and should be applied in a spirit of fair respect to the rights of the individual taxpayer.

We think it is impossible to so construe the law as to allow the plaintiff to recover as he claims. There is no error in the judgment appealed from.

The other judges concurred.

LITTLER v. JAYNE et al.

Supreme Court of Illinois, 1888. 124 Ill. 123, 16 N. E. 374.

SHELDON, J. This was a bill filed by the complainant, for himself and all other taxpayers of the state, to enjoin the defendants, state house commissioners, from making, signing or approving vouchers for any expense incurred, under a certain contract therein mentioned for the making of eight electro-bronze statues of public men of the state of Illinois. [The bill was dismissed by the trial court, and the order of dismissal affirmed by the Appellate Court. The case is now before us on a writ of error sued out by the complainant.]

The grounds of the bill are, that the contract was let without advertisement for bids for the work, as required by law. * * *

[By act of the General Assembly of this state, $531,712 was appropriated for the purpose of completing the new state house at the capital of the state, and commissioners were appointed to superintend the construction of the building.] Section 2 of said act * * * provided that all contracts for labor or materials in the erection and completion of said state house, requiring an expenditure of more than $500, should be let to the lowest responsible bidder, * * * after advertising for bids * * * for the same, for at least thirty days, in two daily papers published in the city of Springfield and in the city of Chicago. * * *

The contract in question was made with Poulson & Eger, and is for eight copper-bronze statues, made * * * from models furnished them, each to be ten feet high, for the sum of $7,600. The cost of the models to be furnished by the commissioners was $2,400, making the aggregate cost of the statues $10,000. All the advertisement there was in relation to the matter was the following, published in two daily newspapers of Springfield and Chicago [as provided by the statute, and continuing therein] for more than thirty days prior to the letting of the contract to Poulson & Eger, viz.:

"*Notice to Contractors.*—Sealed proposals for finishing the unfinished portions of the Illinois state house will be received by the state house commissioners, at their office in the capitol building, at Springfield, until September 1, next, * * * for the following parts of the work, viz.: For all the cut stone and granite work; for all the marble finish and floor tiling; for the iron inner dome; * * * for the plain and ornamental plastering; * * * for the plumbing and gas fitting.

"Full particulars as to the before mentioned work can be obtained at the office of the architect, W. W. Boynton, 157 La Salle Street, Chicago, where the plans and specifications can be consulted. * * * The commissioners reserve the right to reject any or all bids." * * *

This is all the evidence there is * * * that the letting of the contract for these statues was advertised, as required by law. * * * There is in this no mention of statues, and evidently no sufficient notice to attract the attention of, and invite bids and proposals from, persons engaged in the business of furnishing statuary. * * * [It is not possible to regard the contract here before us as let in compliance with the statute requiring that all contracts for labor and materials shall be let after advertising for bids for the same for thirty days, since the only advertisement published contained no reference whatever to the statues which constitute the subject-matter of this contract.]

We regard this contract with Poulson & Eger for these statues as essentially a private contract made with them, and not as having been publicly let in compliance with the statute, but let contrary to its provisions, and we must hold the same, therefore, to be null and void. * * *

The judgments of the Appellate and circuit courts will be reversed, and the cause remanded to the circuit court of Sangamon county, for further proceedings in conformity with this opinion.

Judgment reversed.[6]

[6] All contracts for public work, whether it be with the state, a city, town, county, incorporated village, school district, drainage or sanitary district that the contract is made, are construed strictly with reference to the capacity of the particular public corporation. Wherever the statutory authorization for public work is not literally complied with, the contract is void. No recovery can be had on the contract, and, furthermore, no recovery is available to the contractor in quasi contract, or quantum meruit, for the reasonable value of the benefit received in the shape of labor and materials, for the reason that "the law will not imply a contract which the law forbids." Thus if the statute or ordinance or charter of the public corporation letting the contract provides that contracts for public work must be let to the lowest bidder, or must be advertised for a specified time, or in a specified way, then if the contractor, even though he has completed the building, was not the lowest bidder, or if the advertisement was not published for the specified time or in the specified manner, the contract is void, and the builder may not recover the agreed price, nor even the value of the labor and materials he has put in the building.

Therefore the greatest care should be exercised wherever a contract with a public corporation is contemplated. The act or statute creating the corporation or board must be studied; the charter of the corporation must be examined to determine whether the power to make this contract is within the corporation's legal capacity. The statute limiting the city's power to incur debts is of course of supreme importance, for no recovery can be had by a contractor where that limit has been reached. Such contracts are so precarious in their nature that the best of lawyers should be consulted before any bid for public works may safely be submitted.

CHAPTER 4

LEGALITY

SECTION 1.—IN GENERAL

We may have an agreement, founded upon a good consideration, and made between competent parties, yet, if its object be an illegal one, it will not be enforceable at law. To result in a contract, an agreement must create a legal obligation; and legal obligations are only such as the courts may enforce. Since an agreement having an illegal object is not enforceable at law, it never becomes a contract; and, although we speak of illegal contracts, we in reality are referring to illegal agreements, an illegal contract being an impossibility.

Nature of Illegal Agreements.—A common classification of unlawful agreements is as follows: (1) Agreements contrary to public policy; and (2) agreements in violation of statutory enactment. An undertaking to perform any act that is expressly forbidden by statute is illegal and void. Also a promise to perform an act which would be detrimental to the public in general is illegal and void, even though there be no statute to forbid it. So a contract to commit a crime, being in violation of statutory law, is illegal. A contract not to marry is likewise illegal, not because contrary to any statute, but upon grounds of public policy. Little emphasis should be laid upon classifications, for they afford small assistance.

Sunday Contracts.—Exclusive of statute, Sunday contracts are valid. In many states, however, an agreement entered into on Sunday, or to be performed on Sunday, is by statute made illegal and void. In such states, however, an exception is made as to works of charity, necessity, or mercy. If the act be done to preserve life, health, or property, and can only be done on Sunday, it is lawful. In New York, Minnesota, and Wisconsin, it has been held that no action lies on a contract for advertising in a Sunday newspaper, performance being contemplated on Sunday.

Licensed Occupations.—Numerous statutory requirements exist in the various states as to engaging in specified occupations only where licensed to do so. Physicians and surgeons, attorneys, real estate brokers, architects, engineers, etc., are frequently required to be licensed; and a failure to comply will render illegal and unenforceable any contract for professional services entered into by such unlicensed practitioner. Any kind of agreement in violation of laws regulating trades, professions, or businesses is in general illegal and unenforceable.

Usurious Contracts.—Statutes in all states have prescribed a lawful maximum for interest rate on loans, and any agreement to pay more than the lawful rate is illegal. The usury laws differ considerably in the different states. In some, the entire contract is void, and not even the principal may be recovered by the creditor; in others, the creditor forfeits all interest; in others, the creditor may collect interest up to the legal rate.

Contracts Against Public Policy.—The above comment indicates a few only of the various types of action which the law forbids. Many acts are expressly prohibited by statute. Agreements which have for their object the performance of any of these acts are illegal and unenforceable. But there are many acts, not prohibited by statute, which, because against public policy generally, the courts declare illegal. A definition of public policy is scarcely possible. If an agreement is one which is directed against the maintenance of public authority, against public morals, or against the economic welfare of society, it will be treated as illegal as against public policy. Some examples of such agreements are illustrated in the cases following.

Effect of Illegality.—Illegal agreements not being enforceable at law, they do not become contracts, for the reason that they do not create legal obligations. Courts will not enforce such illegal undertakings, but "will leave the parties where they are." Being void, courts will not enforce them while executory, nor will they assist any party thereto in recovering compensation for anything he may have paid or parted with in performance thereof. The law will *"refuse its aid to either party to an illegal agreement."*

SECTION 2.—RESTRAINT OF TRADE

The law has from early times assumed the competitive system to be the proper basis for the economic life of the people. Monopoly being the antithesis of competition, the law has always declared acts tending thereto to be against public policy. A contract in restraint of trade, since it tends to create a monopoly, is therefore illegal and void.

A limitation to this rule has, however, become universally accepted. Where the restraining agreement is only incidental to the sale of the good will of a business, it is valid, if reasonable. An agreement which has for its main object the stifling of competition is unlawful, as a general restraint of trade. But where the restraint is only a subordinate part of the contract, and is reasonably necessary to carry into effect the lawful purpose of the contract, it is valid. "It is an encouragement to industry, and to enterprise in building up a trade, that a man shall be allowed to sell the good will of his business." If the owner of a busi-

ness, upon the sale thereof, could not validly bind himself not to go into the same business in the same community, he could not sell what is in fact a valuable property right, the good will of his business. Therefore contracts in partial restraint of trade are lawful, if the restraint is reasonably necessary, as to area and time, for the accomplishment of the permitted purpose.

HALL MFG. CO. v. WESTERN STEEL & IRON WORKS et al.

Circuit Court of Appeals of the United States, Seventh Circuit, 1915. 227 F. 588.

BAKER, Circuit Judge. [This is a bill brought by the Hall Manufacturing Company against the Western Iron Works to enjoin the breach of an agreement not to compete. The facts as established by the proofs may be summarized as follows:] Appellant, an Iowa corporation, * * * was engaged in making wire stretchers, hoisting blocks, stake irons, weed pullers, and similar farm appliances, and in selling them * * * wherever there was a demand. Appellee, Western Steel & Iron Works, a Wisconsin corporation, located at De Pere, * * * made and sold post-hole augers and diggers. * * * On November 26, 1910, appellee sold and conveyed to appellant everything pertaining to the digger and auger business, machinery, tools, dies, finished and unfinished stock, orders, patents, and "the good will of the business." Collateral to the sale of the good will appellee covenanted [to forward to appellant] "any orders it may receive for augers and diggers after December 10, 1910," and "not again to go into the manufacture of post-hole augers and diggers."

At the time of the sale, [appellee] had marketed these articles in thirty-four of the United States and in two Canadian provinces. * * * Appellee's sales were entirely to jobbing houses; [and by the admitted representations of the appellee's treasurer we may take the facts to be that the trade extended or might be expected to extend] "throughout all parts of the United States and Canada where augers and diggers can be used." So it is evident that appellee was selling and was covenanting to protect a national and international good will. * * *

This purchase was made by appellant because diggers and augers would fit in well with the lines of farm appliances it was already making and selling. Neither before nor afterwards was appellant a party to any combination or agreement for fixing prices or restraining competition. And * * * prices [have been] as low as formerly, under competition of the same number of independent manufacturers doing business throughout the country. [Thus the purpose of the agreement is not illegal as tending to establish monopoly.]

Appellant began promptly to manufacture and market the same seven styles that appellee had been supplying to the trade, and under the same seven names. * * * Within a month or so appellee * * * began to manufacture all its former open styles under the old names, and to sell them wherever it could. [Appellant's protest of this conduct being un-

availing, this suit was begun, the defense being that the covenant is illegal as in restraint of trade and therefore void.]

Is appellant remediless? The trial court so decided, because the protective covenants are without limitation of either time or place.

In the first reported case, that of John Dier, decided in 1415, Year Book 2 Hen. V, 5, covenants were held to be unenforceable, no matter how limited in time and place. Hull, J., said: "In my opinion * * * the obligation is void, inasmuch as the condition is against the common law; and (per Dieu) if the plaintiff were here he should go to prison till he paid a fine to the king."

During the generations when an artisan had to pass through apprenticeship into a guild, when he was tied to his trade and place by statutes forbidding him to leave his parish under pain of pillory or prison, when if he could not stand where he was rooted he would become a public charge, it may have been right enough for the king's courts to see no public interest but the artisan's ability to pay taxes and serve the king. [But fifteenth century doctrines of absolutism ought not to govern twentieth century conditions of democracy.] It took the courts a long time to get beyond testing the validity of a restrictive covenant purely by the presence or absence of limitations. If a restraint was unlimited as to both time and place, or was unlimited as to place though not as to time, it was unenforceable; if limited as to both time and place, or if limited as to place, though not as to time, it was valid.

But, beginning about 1830, the advent of the factory system, multifold new machines, railroads, steamships, * * * telegraphs, telephones, wireless, * * * automobiles, aeroplanes, lessening space, shortening time, * * * emphasized a point of view that had been suggested in somewhat earlier times; and that is that the validity of a restrictive covenant should be tested by determining whether on the facts of the particular case the restraint is greater than is reasonably necessary for the protection of the purchaser of the business and good will. * * *

Tested by the rule of reason, a restrictive covenant is not necessarily valid because it is limited in time and place. Logically the corollary follows that by the same rule of reason a restrictive covenant is not necessarily invalid because it is unlimited in time and place. A restraint of 500 miles and 50 years on a village doctor, who had only a local practice, would be unreasonable, because not reasonably necessary to the protection of his successor, while a general covenant by Pears Soap Company should be enforced * * * because the good will of the business is world-wide and of expected indefinite continuance.

[The covenant here before us not being in unreasonable restraint of trade, is legal, and should be enforced through the injunctive remedy sought.] * * *[1]

1 In the absence of statutes, most American courts follow the principal case. But a few states, as, for example, Illinois, follow the old English rule, and declare a restriction which is coterminous with the limits of the state to be against public policy and an illegal restraint. Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346 (1901). But even here a reservation of the privilege of carrying on the business somewhere in Illinois would save the validity of the contract.

SECTION 3.—AGREEMENTS IN BREACH OF TRUST

HOLCOMB v. WEAVER.

Supreme Judicial Court of Massachusetts, 1884. 136 Mass. 265.

HOLMES, J. The plaintiff in New Bedford was written to from New York on behalf of the Pasque Island Club, and requested to find a builder who could erect a building for them cheaper than the New York builders. The letter continued, "but we only want parties that you can indorse in every way responsible and reliable." The plaintiff in reply introduced the defendant, who made his estimates, was employed, erected the building, and was paid. At an early stage of the proceedings, the plaintiff asked and obtained a promise from the defendant to pay him $250, "as a commission or compensation for his trouble in the matter," which is the promise sued upon. The plaintiff testified that this promise was made without the knowledge of the club, but that he expected no pay from them for procuring the defendant to erect the building. The court ruled that the plaintiff could not recover; and the plaintiff excepted.

The ruling was clearly right. The plaintiff was not asked merely to introduce a possible contractor, who was to be dealt with by the club on the same footing as any one else, and to stand at no advantage in bargaining with them by reason of the introduction, as in Rupp v. Sampson, 16 Gray, 398, 77 Am. Dec. 416. He was asked to recommend some one as in every way responsible. His recommendation obviously was expected to have weight with the club and did have it. If his agreement with the defendant was made before his recommendation, it had a necessary tendency to give a bias to what they knew the club relied on as disinterested. A recommendation under these circumstances would have been a fraud, even if gratuitous, and it is therefore immaterial whether the club was to pay for it or not, although it is hard to see why the plaintiff could not have recovered for his trouble if he had dealt fairly. If, then, the agreement was made at the time supposed, it was open to all the objections so fully stated in Fuller v. Dame, 18 Pick. 472, and was void by that and other Massachusetts decisions. Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459. See, also, Atlee v. Fink, 75 Mo. 100, 42 Am. Rep. 385; Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549; Panama & South Pacific Telegraph v. India Rubber, Gutta Percha & Telegraph Works, L. R. 10 Ch. 515.

The agreement was open to the same objections on another ground, whether made before or after the plaintiff had written his recommendation. It was made at all events before the defendant had completed his bargain with the club. The parties knew that the club were seeking to get the work done as cheaply as they could get a trustworthy man to do it. If the defendant had to pay the plaintiff, he would naturally charge it to the club in his estimate, or in some way make the club pay

him back. The tendency of the contract was to induce the defendant to charge, and to make the club pay, more than was necessary or fair, when the plaintiff had led them to expect that they would be dealt with honestly and economically, and certainly with no adverse interest emanating from the plaintiff.

We may add that, if the date of the promise in suit were material and left in doubt, we should assume the fact to be that which was most favorable to the ruling, and also that, if the promise was made after the plaintiff had written to New York recommending the defendant, the plaintiff would have a good deal of difficulty in showing a consideration which was not executed before the promise was made. For the trouble for which the plaintiff was to have a commission obviously meant his recommendation of the defendant. He does not appear to have taken any other.

Judgment affirmed.[2]

SECTION 4.—GAMBLING CONTRACTS

WAUGH v. BECK.

Supreme Court of Pennsylvania. 114 Pa. 422, 6 A. 923, 60 Am. Rep. 354.

[Action on a contract evidenced by a note. The findings of fact are that the defendant, Beck, proposed to purchase oil stock on margin, and applied to the plaintiff for a loan of the money necessary to carry on the speculation. It does not appear that Judge Waugh was to have any share or interest in the gain that Beck might make, although he had

[2] Contracts which are opposed to open and fair dealings are opposed to public policy. "A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character." Wherever a person is in a position of trust and confidence towards another, any agreement the necessary effect of which is to put his interests against those of the other, which he undertakes to protect, is against public policy. Thus contracts to influence public officials, or a contract of a trustee to sell the control of funds intrusted to his care, would be illegal, for "he has no right to traffic in the confidence reposed in him."

Since a person in a position of trust and confidence to his employer owes to the latter his full loyalty, it follows that no secret profit may be made by the former at the expense of the latter. This proposition is illustrated by a California case, Shaw v. Andrews, 9 Cal. 73 (1858) in which an architect, with another person, entered into a contract to construct a building, and the owners made a separate agreement with the architect contractor that he should superintend the work. When the building was done, the owners refused to pay for the superintendence. The architect sued for his money, and the owners claimed that it was illegal, as against public policy, for a person to act as contractor and superintendent at the same time, on the principle that an agent must not deal with himself, and that therefore the contract for superintendence was void. This is undoubtedly the law, and if it had not been for the fact that the architect in this instance had made full disclosure of all the facts to his owners before the several contracts were let, and that the evidence was clear on this point, the contract for superintendence would have been held null and void.

knowledge of the use to which Beck intended to put the borrowed funds. Beck was unsuccessful in his speculations on the stock market, and now refuses to repay the money loaned, his defense to this action being that the contract was illegal and therefore void.]

Mr. Justice TRUNKEY delivered the opinion of the court.

In England wagers were not unlawful or unenforceable at common law, and therefore some of the decisions in that country upon wagering contracts, are inapplicable [here]. It has never been held in the highest tribunals of Pennsylvania that a wager is recoverable, and * * * the uniform current of authority [in the United States] is to the contrary. Every species of gaming contract [whether of insurance where the insured has no insurable interest, or any kind of wager], or the purchase of stocks * * * without the intention to deliver or receive them, is reprobated by our law. * * *

A transaction in stocks by way of margin, settlement of differences, and payment of gain or loss, without intending to deliver the stocks, is a mere wager. * * * It is a gambling or wagering operation, which the law does not sanction and will not carry into effect. And a broker who advances money to pay losses incurred in such operations cannot recover the amount advanced, nor even his commissions for his services. * * *

The jury have found that the plaintiff furnished the money, that is, the consideration of the notes for the benefit of the defendant, but knowingly and with the purpose of furthering a gambling transaction. * * * As a general rule money loaned for the specific purpose that it shall be used by the borrower to do an act in violation of law, and has been so used, cannot be recovered back by the lender. It is not enough to defeat recovery by the lender that he knew of the borrower's intention to illegally appropriate the loan; he must know that the borrower is purposing the specific illegal use, and must be implicated [to the extent that his purpose was the furthering of the illegal use]. * * *

When the plaintiff, whilst engaged with the defendant and others in gaming and playing at cards for money, lent the defendant a sum of money for the purpose of enabling the defendant to engage and continue in the gaming, it was held that the loan was an illegal contract, and that the money could not be recovered. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect. * * * White v. Buss, 3 Cush. 448. * * *

[These principles are applicable not only where the acts are violative of statutes, but also where the acts are illegal solely on the ground of public policy.] * * * Where a man lends money to another for the express purpose of enabling him to commit a specific unlawful act, and such act be afterwards committed by means of the aid so received, the lender is a particeps criminis [participant in the illegal act, and cannot recover the money so loaned]. * * *

[Judgment for defendant.] [3]

[3] "That a contract of sale may be made for the future delivery of goods may not be doubted; and that such a contract, by the agreement of parties, or by

GRIGSBY v. RUSSELL et al.

Supreme Court of the United States, 1911. 222 U. S. 149, 32 S. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863.

[Appeal from a decree of the Circuit Court of Appeals to the effect that an assignee of an insurance policy taken out by the insured, on his own life, is not entitled to the insurance; the contract being illegal for lack of an insurable interest.]

Mr. Justice HOLMES delivered the opinion of the court.

This is a bill of interpleader brought by an insurance company to determine whether a policy of insurance issued to John C. Burchard, now deceased, upon his life, shall be paid to his administrators or to an assignee, the company having turned the amount into court. The material facts are that after he had paid two premiums and a third was overdue, Burchard, being in want and needing money for a surgical operation, asked Dr. Grigsby to buy the policy, and sold it to him in consideration of $100 and Grigsby's undertaking to pay the premiums due or to become due; and that Grigsby had no interest in the life of the assured. The Circuit Court of Appeals, in deference to some intimations of this court, held the assignment valid only to the extent of the money actually given for it and the premiums subsequently paid. * * *

Of course, the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And although that counter interest always exists, as early was emphasized for England in the famous case of Wainewright (Janus Weathercock), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue, and so one that is opposed to crime. And what, perhaps, is more important, the existence of such an interest makes a roughly selected class of persons who, by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death.

But when the question arises upon an assignment, it is assumed that the objection to the insurance as a wager is out of the case. * * * But this being so, not only does the objection to wagers disappear, but also the principle of public policy referred to, at least, in its most con-

the regulations of the boards of trade in the country, may be transferable from one to the other, will be conceded; but when entered into for the sole purpose of speculating in futures, and with no intention to deliver the cotton purchased, but to pay the difference between the contract price of the cotton and its market price on the day, if a contract in good faith, the cotton was to be delivered, then the contract becomes a mere wager, and neither party to it can recover." Beadles v. McElrath, 85 Ky. 230, 3 S. W. 152 (1887).

vincing form. The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. * * * Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming. * * *

On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by the Bankruptcy Law, § 70 [11 USCA § 110], which provides that unless the cash surrender value of a policy like the one before us is secured to the trustee within thirty days after it has been stated, the policy shall pass to the trustee as assets. Of course the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. * * *

Decree reversed

SECTION 5.—AGREEMENTS IN VIOLATION OF POSITIVE LAW

(1) Agreement to Perform a Criminal Act

STANDARD LUMBER CO. v. BUTLER ICE CO.

Circuit Court of Appeals of the United States, Third Circuit, 1906. 146 F. 359, 7 L. R. A. (N. S.) 467.

Gray, Circuit Judge. In the court below, the plaintiff in error, the Standard Lumber Company, a corporation of the state of Pennsylvania, brought an action ex contractu against the defendant, the Butler Ice Company, a corporation of the state of Delaware. The statement of claim sets forth a certain contract in writing between plaintiff and defendant, whereby the plaintiff undertook to provide the materials and do all the work mentioned and shown in specifications and drawings, referred to in said contract, for the erection and completion of an ice plant, with certain exceptions therein stated; and in consideration thereof, the defendant agreed to pay plaintiff the sum of $10,808. It was also agreed that there should be paid $6.50 per perch for extra stonework, above that shown in said plans, and 50 cents per yard for extra excavating, subject to additions and deductions as in said contract provided. It is then alleged that plaintiff had provided all the materials, and had performed all the work stipulated for in said contract, in

accordance with the terms thereof, and that defendant had accepted the same; that plaintiff had also done extra work under the contract, amounting to $2,838, so that the $10,808 agreed to be paid for the completion of the work specified in the contract, and the amount to be paid for the extra work, at the rate stipulated for therein, amounted to $13,646. Against this sum, the plaintiff allows defendants credits to the amount of $11,624, leaving a balance of $2,022 claimed as due from defendant to plaintiff.

The written contract, as set out in the statement of claim and produced at the trial, was executed by the plaintiff, the Standard Lumber Company, under its seal and the signature of J. M. Wetherill, manager, and on the part of the Butler Ice Company, under the seal of said company and the signatures of Peter F. McCool, its president, and S. B. Hermes, its secretary. The affidavit of defense set out, and it was proved at the trial, that the plaintiff company, by a letter addressed to P. F. McCool, then president of the defendant company, and signed by the Standard Lumber Company, "Per F. E. Brotherton," agent of the plaintiff company, duly authorized in that behalf, proposed to build the ice plant for defendant company, according to the plans and specifications submitted, for the sum of $6,309.50; that the plans and specifications referred to in said bid, were the plans and specifications referred to in, and made part of, the contract between plaintiff and defendant companies, upon which suit was brought in the court below, and in which the consideration named for the work included in this bid was $10,808, and that the bid for $6,309.50 was full price for said work. Subsequent to the making of said bid, by agreement between Peter F. McCool, president of the defendant company, and the plaintiff company, acting through its manager, Wetherill, the said bid for said work was increased to the sum of $10,808, and the contract upon which suit was brought was then entered into upon that consideration to be paid by the defendant company, it being understood by the said officers of the two companies, that when the consideration was paid by the defendant company, $2,000 of the difference between the original bid and the contract price, was to be paid to the said Peter F. McCool, and that the balance was to be divided between the said Wetherill and the said plaintiff company. The testimony as to this corrupt understanding and contract was uncontradicted, and it was not denied that the consideration of the written contracts was thus corruptly increased, or that the president of the defendant company conspired with the plaintiff company and its manager, Wetherill, to defraud the said defendant company for his own benefit. * * *

The undisputed facts being that the manager of the plaintiff corporation, with the knowledge of its directing and executive authorities, entered into a corrupt bargain with the president of the defendant company, to add more than 50 per cent. to the original bid, with the understanding that the amount by which the bid was thus increased should, when paid by the defendant company, be divided between the conspirators. It is too mild a characterization of such a transaction to

say that it was fraudulent. It was a gross scheme for the abstraction of more than $4,000 from the treasury of the defendant company, to be converted to the use of the conspirators, the larger share of it to the defendant's own president. The acts and conduct thus described are clearly in violation [of a statute of Pennsylvania expressly declaring such action to be criminal]. * * *

The contract was not only immoral, but it was illegal and criminal, and therefore void. No court would be justified in enforcing the whole or any part of such a contract. From an origin so flagitious, no right of action can arise. * * *

The defendant, however, contends that the contract, as to the payment of $10,808, which included the amount to be stolen from defendant, was executed, and that the balance sued for referred to the extra work under the stipulations of the contract, and had no relation to the fraudulent part thereof. The evidence will not permit a serious consideration of this contention. There was no appropriation of the payments made from time to time to any particular part of the contract, and plaintiff cannot now make that appropriation for his own benefit. The poison of the immoral consideration infects the contract as a whole, and the court below were right in refusing to lend its aid to the enforcement of any part thereof.

Nor is the principle invoked by the defendant, that no one may show his own turpitude, applicable here. The real defendant is the company. It was the victim, not a perpetrator of the fraud. Its president conspired with plaintiff to take from it a large sum of money, by falsehood and deception practiced through the medium of the contract here sued upon. But, even if the defendant could by any possibility have been shown to have been a party to its own spoliation, by the dishonest conduct of its president, it could still have alleged the illegal consideration as a defense. Where the contract on which the action is founded is contra bonos mores, or forbidden by express law, the defendant may plead its invalidity, even though he be a participator in the wrong. In such a case, the courts refuse to enforce the contract on grounds of public policy, and not as a matter of private interest.

In Holman v. Johnson, Cowp. 343, Lord Mansfield says: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy. * * * No court will lend its aid to a man who founds his action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appear to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." * * *

[Judgment affirmed.]

(2) Agreement to Invade Property Rights

SHORTALL et al. v. FITZSIMONS & CONNELL CO.

Appellate Court of Illinois, 1900. 93 Ill. App. 231.

Mr. Justice Windes delivered the opinion of the court.

Appellants brought an action on the case against appellee, a corporation, to recover damages for an alleged breach of contract between them and appellee, whereby the latter contracted to build a protection wall, according to certain plans and specifications, near to and along the shore line of appellants' real estate, lying along and adjacent to Lake Michigan, a trial of which before the superior court and a jury resulted in a verdict for appellee, directed by the court at the close of plaintiffs' evidence, and a judgment thereon, from which this appeal is prosecuted.

The specifications show that the wall was to be "built close to the water's edge, along a line of be designated by the trustees," and the piles used in its construction were to be driven "so as to leave the heads 6 feet above the water level." The appellants seem to have acted as trustees for a syndicate. The length of the wall, as contemplated, was about 600 feet, but only 404 feet were built, which was paid for by appellants under an arrangement by which it was to be paid for as much as should be built. The line on which the wall was to be built, as located and laid out by the appellants, ran through the water of the lake about 50 feet, and, when the water was still, this line was about 10 feet from the shore line. The part of the wall built was in the water for some distance, about 80 feet, and where the water was from 6 inches to 1 foot in depth. Appellee was ordered to stop the construction of the wall, when 404 feet of it had been constructed, by the Lincoln Park Commissioners, who, under the act of the Legislature of Illinois (Hurd's Stat. 1897, c. 105, par. 177, § 16), claimed to be the owner in fee, in trust for the people of Illinois, of the submerged lands under Lake Michigan at this point.

There is evidence tending to show that appellee did not build the wall of the kind of material specified, and that both appellee and appellants thought that at the time the contract was made they were acting "within their rights," to use the language of one of the appellants in giving his testimony—in other words, that they thought the contract was not in violation of the law.

The intention of the parties to the contract cannot make their contract legal when it is in contravention of the law. If this submerged land was not owned by the Lincoln Park Commissioners, the title thereto was in the state of Illinois in trust for the public. Revell v. People, 177 Ill. 468–478, 52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257, and cases cited.

And the contract to build this wall through the waters of Lake Michigan by driving piles into and making a permanent structure upon the lands under said waters, was an illegal contract. The wall was a pur-

presture, and liable to abatement at the instance of the state. Revell Case, supra, 478–489 (52 N. E. 1052) and cases cited.

The claim of appellants that, because the contract is not immoral and has been partially performed, there can be a recovery, is not, in our opinion, tenable. Appellants' right to a recovery is based upon the illegal contract, a breach of which is of the very gist of their action. Without proof of their contract, their case must fail. It may be true, as stated by the learned counsel in their brief, that there are many illegal contracts in respect of which the parties are not wholly remediless, but the facts of this case do not present such a contract. In Goodrich v. Tenney, 144 Ill. 422–430, 33 N. E. 44, 47 (19 L. R. A. 371, 36 Am. St. Rep. 459) the court, in speaking of the unjustness of one party to an illegal contract trying to take advantage of such illegality, say, "The contract being illegal, no rights can be enforced under it," and quote from Lord Mansfield, viz., "No court will lend its aid to a man who founds his cause upon an illegal or immoral act," and held that the defense may be made by one *in pari delicto,* not because he was entitled to the relief, but upon principles of public policy and to conserve the public welfare.

The court also held, citing and reviewing many cases, that there could be no recovery in that case because it could be had only through and under the illegal contract.

To a like effect are Bishop v. Amer. Preservers Co., 157 Ill. 284–315, 41 N. E. 765, 48 Am. St. Rep. 317; Cook v. Meyers, 166 Ill. 282–289, 46 N. E. 765; Paige v. Hieronymus, 180 Ill. 637–641, 54 N. E. 583, and Cisna v. Sheibley, 88 Ill. App. 385–394. In the Bishop Case the court say the general rule of law is that, "when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."

We know of no well-considered case where a recovery has been allowed where the very basis of the action is an illegal contract or its breach. * * * We are of opinion that the judgment is correct, and it is affirmed.

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(3) Agreements in Violation of Building Laws

WILLIAM WILCOX MFG. CO. v. BRAZOS.

Supreme Court of Errors of Connecticut, 1901. 74 Conn. 208, 50 A. 722.

[It appears that plaintiff was the owner of a factory and water power, and that on December 25, 1895, the defendant and his three sons, who were partners, contracted to build a dam for the plaintiff company; that on April 16, 1896, shortly before the completion of the said dam, and before the plaintiff had approved and accepted it, the defendant requested payment of the balance promised for construction; that said sum was not then due, and that the defendant promised that if the plaintiff would pay the said sum immediately, and before the plaintiff inspected the dam, he (the defendant) would agree to build another dam

in the same place and manner, in the event the dam already built should be carried away or destroyed by force of water within ten years from said date. Whereupon the written guaranty and agreement to rebuild was signed by the defendant, and the money paid.

It appears further that in the following year the said dam was carried away by force of water; that the plaintiff applied to the defendant to rebuild the dam in accordance with his agreement; that to said notice the defendant replied the same day in writing to the plaintiff as follows: "As I am advised your dam cannot be rebuilt according to the old plan and specifications, immediately upon receipt of plans and specifications prepared in accordance with section 3699 of the General Statutes of this state, I will submit an estimate for rebuilding your dam according to such legal plans and specifications, and make such deduction or allowance to you from the fair contract price as will be just and reasonable on account of our former contract." That the plaintiff refused to accede to this, but insisted that defendant rebuild at his own cost in accordance with the terms of his agreement. Upon the defendant's refusal so to do, plaintiff instituted this suit; and defendant has interposed the defense of illegality.

Section 3699 of the General Statutes provides that, prior to the construction of any dams or reservoirs, the plans and specifications therefor must be submitted to the state board of civil engineers for inspection and approval; and that without the certificate of the board, no such dam or reservoir may be built or used.]

HALL, J. The only cause of action described in the complaint is the nonperformance of the defendant's written contract to rebuild the plaintiff's dam. * * * If the agreement sued upon is a contract to rebuild the original dam at the same place, in the same manner, and upon the same unapproved and insufficient plans and specifications upon which the original dam was built, it is a contract to do something expressly prohibited by statute, and is for that reason void. * * *

The fact that the defendant participated in making the illegal contract does not prevent him from pleading its illegality. Although it is the policy of the law not to interpose for the purpose of aiding either party to an illegal contract, to enforce its obligations or to obtain its benefits, yet when an action is brought upon such an agreement [either party may plead the illegality, and] the law will leave the parties where it finds them. * * *

There is no error in the record. Judgment for defendant affirmed.

(4) Where by Statute Public Works Must be Let to Lowest Bidder

DOLAN et al. v. SCHOEN et al.

Supreme Court of Pennsylvania, 1918. 261 Pa. 11, 104 A. 149.

Walling, J. This is a taxpayer's bill to restrain the expenditure of public money. Pottsville is a city of the third class; and, at the beginning of 1916, its councilmen decided to remodel and improve the city hall. For such purpose $2,500 were included in the general appropriation ordinance for that year. An architect was employed to prepare plans and specifications, and thereafter, upon due advertisement, bids were submitted for different parts of the work, a tabulation of which showed that the improvement would cost nearly $2,000 more than the sum appropriated, and the bids were rejected. Then the council transferred the $2,500 to a contingent fund. Hiram S. Davies, a member of council, was superintendent of parks and public property, and as such took a leading part in this matter. He consulted with some who had submitted bids and with others; took them to the city hall, and verbally explained what was to be done in the different branches of the work; secured new bids on such explanations without advertising, and ignoring the original plans and specifications. The mayor and council let contracts on such new bids, and the work was proceeded with. The improvement as so made cost about $2,000, and included new heating, lighting, and plumbing systems; also new partitions, stairs, doors, windows, etc. It also included some excavation and the construction of a new drain in the basement, and the removal of the tower; also plastering, painting, papering, etc.

As stated by the court below: "It consisted in the remodeling of the city hall; new rooms were added; bathrooms put in; staircases changed; hall built. In fact, the interior of the building was completely changed." So far as appears the work was well, economically, and honestly done, and no fraud is alleged. However, plaintiff filed this bill to enjoin the city authorities from paying and the contractors from collecting for the same, on the ground that the work had been illegally done. A preliminary injunction was granted as prayed for, which the court below made permanent after final hearing. Defendants appealed.

We are all of the opinion that the decree was right under the law. Section 5 of article 4 of the Third Class City Act of June 27, 1913 (P. L. 568, 576), known as the Clark Act, provides, inter alia: "All stationery, paper, and fuel used in the council and in other departments of the city government, and all work and materials required by the city, shall be furnished, and the printing, advertising, and all other kinds of work to be done for the city, except ordinary repairs of highways and sewers and other public improvements, shall be performed, under contract to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance. * * * Council may by ordinance provide a contingent fund for necessary repairs or incidental

expenses, not otherwise provided for in the general appropriations, and such funds may be expended without advertising for bids."

The work here was not done under contract given to the lowest responsible bidder. In fact, all the competitive bids had been rejected, and these contracts were let by private arrangement on different conditions. The claims cannot be sustained under the exception as to ordinary repairs, for the chancellor properly finds that the improvements in question were not ordinary repairs. Neither can they be included under the term necessary repairs or incidental expenses. Council evidently did not regard the improvements to the city hall as necessary repairs to be made from the contingent fund without advertising for bids, as they embraced that expense in the general appropriation ordinance and advertised for bids. True, as the chancellor finds, some of the work may properly be classed as ordinary repairs, but as that is blended with the other it cannot be made the basis for a separate claim. To hold that a contingent fund created to meet incidental expenses and necessary repairs could be used for the permanent alteration and remodeling of public buildings would practically abrogate this section of the statute. Council might have changed their plans and readvertised for bids, but they could not evade the law by the attempted creation of a contingent fund and by denominating the improvement necessary repairs. New partitions, new stairways, new windows, new entrances, etc., cannot pass as necessary repairs. While here no actual loss resulted, yet the statute requiring important municipal work to be open to competition is a valuable protection to the public, and cannot be ignored.

The provision stated in the above-quoted section is not new to the statutes of this commonwealth. It appears in the Wallace Act of May 23, 1874 (P. L. 230), and in subsequent legislation, and has been construed by this court. In Mazet v. Pittsburgh, 137 Pa. 548, p. 561, 20 A. 693, p. 697, it is held: "It cannot be doubted that the true intent of the Act of 1874, and the ordinance passed in pursuance thereof, regulating the awarding of public contracts, is to secure to the city the benefit and advantage of fair and just competition between bidders, and at the same time close, as far as possible, every avenue to favoritism, and fraud in its varied forms." See, also, Louchheim v. Philadelphia, 218 Pa. 100, 66 A. 1121.

In considering a similar provision relating to cities of the second class in the very recent case of Philadelphia Co. v. City of Pittsburgh, 253 Pa. 147, 151, 97 A. 1083, 1084, our Brother Mestrezat, in delivering the opinion of the court, says: "We have uniformly held in numerous decisions, and it may now be regarded as the general rule in this state, that where the charter act of a city prescribes the method or formal mode of making municipal contracts, it must be observed, and, if not executed in conformity therewith, a contract is not enforceable against the municipality."

The assignments of error are overruled, and the decree is affirmed, at the costs of the appellants.

SECTION 6.—ARBITRATION AGREEMENTS

J. T. WILLIAMS & BRO. v. BRANNING MFG. CO.

Supreme Court of North Carolina, 1911. 154 N. C. 205, 70 S. E. 290.

[Civil action for damages for breach of contract in writing, in which plaintiffs obligated for certain consideration to operate defendant's lumber plant at Ahoskie, * * * and to cut into logs the standing timber of defendant and manufacture them into lumber at said plant. * * * In the contract of 1904, the following provision is incorporated:

"Sec. 9. It is further understood and agreed in the event of any future misunderstanding or disagreement between the parties hereto, * * * that the matter shall be settled by arbitrators [in the manner herein set forth], whose award shall be accepted as final between the parties. * * *"

It is admitted that, disagreements having arisen, the matters in controversy were submitted to arbitration and award entered. Plaintiff, disregarding the award, sues on the contract.

So far as the parties have actually arbitrated their differences, and with respect to the matters embraced by the award, we hold that the parties are concluded by the findings of the said arbitration. It appears that the award was entered before notice was given by the plaintiff of his revocation of the arbitration agreement; therefore he is bound by it.

However, as to the disputes which have arisen in connection with the contract since the entry of the award, matters stand upon another footing. Defendant insists that the agreement to arbitrate deprives the plaintiff of the right to sue in the courts upon the contract, and confines him to the remedy by arbitration. Plaintiff contends that the said agreement to arbitrate is an illegal agreement, against public policy, in that it deprives the courts of jurisdiction.]

WALKER, J. * * * It has generally been held that an agreement to arbitrate controversies which may arise in the course of executing a contract is void, as its effect is to oust the jurisdiction of the courts. It was held in Kinney v. Baltimore & O. Employés Relief Ass'n, 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142, and note, that a provision in a contract that all differences arising under it shall be submitted to arbitrators, * * * will not prevent a party from maintaining a suit in the first instance in a court to enforce his rights under it. The court in Home Insurance Co. v. Morse, 20 Wall. (87 U. S.) 445, 22 L. Ed. 365, relying upon the authority of Judge Story (Equity Jurisprudence § 670), * * * thus stated the rule: "Where the stipulation though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court

of equity will not, any more than a court of law, interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced. 'While parties may impose as a condition precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law and not the contract prescribes the remedy. * * * Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdictions. * * *'" The language of other courts is equally explicit: "Where a policy provides that the whole matter in controversy between the parties, including the right to recover at all, shall be submitted to arbitration, the condition is void. The effect of such a provision is to oust the courts of their legitimate jurisdiction, which the parties cannot do." German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406. * * * "The agreement to submit to arbitrators, not consummated by an award, is universally held to be no bar to a suit at law or equity. * * * In its very nature it must rest on the good faith and consent of the parties concerned. Parties cannot by such arrangements oust the jurisdiction of the courts or deprive themselves of the right to resort to the legal tribunals for the settlement of their controversies. After the arbitrators have acted and rendered an award, the case is very different. Their decision is binding upon the parties. * * * This distinction between a mere agreement to submit and a submission consummated by an award is universally recognized by the authorities. * * *"

"While it is well settled that an agreement * * * to submit to arbitrators the single question of the amount of loss * * * is not invalid, * * * it is equally well understood that a contract which would oust the jurisdiction of the courts by leaving all of the matters involved in any controversy * * * between insurer and insured to such arbitrament is void as against public policy. * * * There is no stipulation in this contract that no suit shall be brought until the amount of loss or damage is ascertained by arbitration, as in Manufacturing Co. v. Phœnix Assurance Co., supra [106 N. C. 28, 10 S. E. 1057], but a sweeping provision that both the liability and the loss shall be decided and settled by arbitrators. [Our conclusion is that the agreement to arbitrate as contained in this contract is illegal and void, and constitutes no bar to a suit on the contract.]

Judgment reversed.[4]

[4] The weight of authority seems to be in accord with the principal case, to the effect that a limited arbitration agreement to submit questions of fact, such as the amount of damages, does not oust the jurisdiction of the court, and is valid, and no action can be maintained on the contract without proof on the part of the plaintiff that he has complied or at least attempted to comply, with the stipulation. But where the agreement to arbitrate includes *all* disputes, it embraces also the general question of liability, which is a question

of law proper only for a judicial tribunal to pass on, and such agreement is illegal and void.

The engineer or superintendent of construction is often named in building contracts as arbitrator to settle questions arising in connection with construction. Here also the agreement is valid, if the reference to the engineer includes only such questions of fact as amount or quality of the work done, or the value of extra work, etc. But an agreement to submit *all disputes* which might arise under the contract to the engineer, his decision to be final and binding on the parties, would be illegal and void.

Any stipulation in a contract that disputes as to construction or what is extra work shall be conclusively determined by one of the parties to the contract, is illegal and void; for "the law will not permit a party making a contract to provide that he shall arbitrate his own cause and that his decision shall be final and conclusive." Board of Commissioners of Fulton County v. Gibson, 158 Ind. 471, 63 N. E. 982 (1902).

CHAPTER 5

REALITY OF CONSENT

SECTION 1.—IN GENERAL

The next element in the formation of a contract to be considered is the genuineness or reality of the consent of the parties, expressed in the offer and acceptance. An agreement, founded upon a good consideration, between competent parties, and for a legal object, may yet fail to be enforceable at law, if the mutual consent of the parties to be bound was given under circumstances which make it no real expression of their intention. There may be no real consent because of (1) mistake; (2) fraud; (3) duress; or (4) undue influence.

SECTION 2.—MISTAKE

(A) In General

Mistake may be either in expression or in intention. Mistake of expression arises where the parties are fully agreed as to their mutual intention, but have, through mistake in reducing their agreement to writing, failed to express therein their true intention. Thus, if an agreement be to sell a lot for $1,700, and the written contract is so drawn as to express the price as $1,300, the mistake is one of expression, and a court of equity, on clear proof of the real agreement, will change or *reform* the written contract to conform to the true intention of the parties.

Mistake of intention occurs where there is error as to the existence, identity, price, or quantity of the subject-matter of the contract. Where it has any effect at all, mistake of intention renders the contract absolutely void. In such case, if the contract is executory, it may be repudiated, or, if it has been executed in whole or in part, it may be rescinded, and whatever has been paid or delivered under it may be recovered.

(B) As to Existence of Subject-Matter

If the agreement is made as to a subject-matter which, unknown to the parties, is not at the time in existence, the contract is void, for it was made under mutual mistake of fact. So, if A sell his cow to B, and, unknown to either party, the cow was dead at the time of the sale, no contract results, and B may recover back from A his purchase money paid. Or where a ship at sea is sold, and it is later discovered that prior to the sale the ship had sunk, the contract is void, because of the mutual mistake of fact as to the existence of the subject-matter.

(C) As to Identity of Subject-Matter

KYLE v. KAVANAGH.

Supreme Judicial Court of Massachusetts, 1869. 103 Mass. 356, 4 Am. Rep. 560.[1]

[Action on a contract to recover the price of land sold to the defendant. The evidence showed a contract whereby the defendant agreed to purchase from the plaintiff four lots of land in the town of Waltham on Prospect street. Subsequently a deed was delivered conveying certain land on Prospect street in Waltham. The defendant contended, and introduced evidence to show, that the land conveyed by the plaintiff was not the land he had bargained for, and that what he had agreed to purchase was a lot of land on another Prospect street in Waltham, in no way connected with that mentioned in the deed, and a long way off.

The judge instructed the jury that, "if the defendant was negotiating for one thing and the plaintiff was selling another thing, and if their minds did not agree as to subject matter of the sale, they could not be said to have agreed and to have made a contract," and "if the plaintiff or the defendant were in fact mistaken as to the location of the land, it was a good defense, although there was no fraud or misrepresentation on the part of the plaintiff, for mistake alone, if proved, was a good defense." The jury returned a verdict for the defendant, and plaintiff took exceptions to the charge.]

Morton, J. * * * The * * * exception taken by the plaintiff cannot be sustained. The instructions given were, in substance, that, if the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This ruling is in accordance with the elementary principles of the law of contracts, and was correct. * * *

[Exceptions overruled.] [2]

[1] Statement of facts is omitted.

[2] It is only where the description of the subject-matter of the agreement is such as is susceptible of two different explanations, as in the above case, that

(D) As to Price

RUPLEY et al. v. DAGGETT.

Supreme Court of Illinois, 1874. 74 Ill. 351.

This was an action of replevin, brought by John F. Daggett against Abram Rupley and Jacob Rupley, to recover a mare which the defendants claimed they had bought of the plaintiff.

It appears that at the first conversation about the sale of the mare, Rupley asked the plaintiff his price, the plaintiff swearing that he replied $165, while the defendant testified that he said $65, and that he did not understand him to say $165. In the second conversation Rupley says he told Daggett, that if the mare was what he represented her to be, they would give $65, and Daggett said he would take him down next morning to see her. Daggett denied this, and says that Rupley said to him, "Did I understand you sixty-five?" Daggett states that he supposed Rupley referred to the fraction of the $100, and meant sixty-five as coupled with the price named at the previous interview. He answered, "Yes, sixty-five." Both parties, from this supposed the price was fixed, Rupley supposing it was $65, and Daggett supposing it was $165, and the only thing remaining to be done, as each thought, was for Rupley to see the mare and decide whether she suited him. The next day Rupley came, saw the mare and took her home with him. The plaintiff recovered in the court below and the defendants appealed.

Scott, J. It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for $165, and it may be appellant was equally honest in the belief that he was buying at the price of $65. There is, however, some evidence tending to show that appellant Rupley did not act with entire good faith. He was told before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given to him. He insisted, however, the price was $65, and expressed his belief he would keep her if there was a mistake. On his way home with the mare in his possession he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be $165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for $65, and could not be compelled to part with his property for a less sum than he chose to ask. It is accord-

there can be such mistake as will avoid the contract. Unless the description admits of more meanings than one, the party claiming he was mistaken can show no more than that he meant something different from what he said; and this can be of no avail, for a unilateral mistake of fact is not ground for avoiding a contract.

ing to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay. * * *

Judgment affirmed.

STEINMEYER v. SCHROEPPEL.

Supreme Court of Illinois, 1907. 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 224.

[Action by Henry Steinmeyer against John Schroeppel. From a decree of the Appellate Court, reversing a decree canceling a contract between the parties, Henry Steinmeyer appeals.]

CARTWRIGHT, J. * * * The jurisdiction of equity to grant the remedy of cancellation because of a mistake of fact by one party to a contract is well recognized. Mutual consent is requisite to the creation of a contract, and if there is a mistake of fact by one of the parties going to the essence of the contract, no agreement is in fact made. * * * The ground for relief is, that by reason of the mistake there was no mutual assent to the terms of the contract. * * * The mistake must not result from want of care and diligence exercised by persons of reasonable prudence under the same circumstances. * * * In this case, the mistake was in the addition of the figures set down by the bookkeeper. The price of each item was written correctly, but appellants claimed that one item of about $400 was placed somewhat to the right, and in adding the column the 4 was counted in the 10 column instead of the 100 column. If that was done, it does not account for the difference of $421. But, if it did, it would only show a want of ordinary care and attention. If the figures were not exactly in line, the fact could hardly escape notice by a competent business man giving reasonable attention to what he was doing. There was no evidence tending to prove any special circumstances excusing the blunder.

The case of Board of School Com'rs v. Bender, 36 Ind. App. 164, 72 N. E. 154 (decided by the Appellate Court of Indiana, Division No. 2), relied on by appellants, differs from this in various respects, one of which is that Bender was excusable for the mistake. His complaint alleged that he was misinformed by the architect that his bid must be in at or before 4 o'clock, when, in fact, he was allowed until 8 o'clock; that in ignorance of the fact and for want of time he was hurried in submitting his bid, and had no opportunity for verification of his estimate, and that under those circumstances he turned two leaves of his estimate book by mistake and omitted an estimate on a large part of the work. The case involved the question whether the bidder had forfeited a sum deposited as a guaranty that he would enter into a contract,

and when notified that his bid was accepted, having discovered his mistake, he informed the architect and immediately gave notice that he would not enter into the contract. By the terms of the bid it was intended that if the bid was accepted a contract would be made, but the bid was not the contract contemplated by the parties and the bidder never did enter into the contract. The court concluded that the minds of the parties never, in fact, met, because the bidder fell into the error without his fault.

In the case of Harran v. Foley, 62 Wis. 584, 22 N. W. 837, there was no agreement, for the reason that the minds of the parties never met. The plaintiff claimed to have purchased of the defendant some cattle for $161.50, but the defendant intended to state the price at $261.50. When the defendant was informed that the plaintiff understood the price to be $161.50 he refused to deliver the cattle and tendered back $20 received on the purchase price. No agreement was, in fact, made, since the statement of the price by the seller was clearly a mistake.

A mistake which will justify relief in equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. The mistake of the appellants did not relate to the subject-matter of the contract, its location, identity, or amount, and there was neither belief in the existence of a fact which did not exist or ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be and it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the lumber to them, or any other miscalculation on their part. If equity would relieve on account of such a mistake there would be no stability in contracts, and we think the Appellate Court was right in concluding that the mistake was not of such character as to entitle appellants to the relief prayed.

The judgment of the Appellate Court is affirmed. * * *

(E) As to Quality

Mutual mistake as to the nature or quality of the subject-matter will not affect the contract. "The fact that the subject-matter of the contract possessed, or failed to possess, qualities which the parties both believed, or did not believe, it to possess, is immaterial." So where a woman sold an uncut stone to a jeweler for $1, both being ignorant of the true nature of the stone, and it turned out to be a diamond worth $500, it was held that the contract was binding.[3]

Similarly, if they dealt with a stone, thinking it to be a diamond, their

[3] Wood v. Boynton, 64 Wis. 265, 25 N. W. 42 (1885).

mutual mistake as to the nature of the stone would not affect the validity of the contract. But if the parties should contract for the sale of "this uncut diamond," in that case the quality of the stone is the very thing bargained for, and a condition of the contract; and if the stone delivered were not a diamond, in such case there would be mutual mistake as to the existence of the subject-matter, and no contract.

Reasons of public policy dictate the rule that mistake as to value or quality of the subject-matter shall not be ground for rescission. If it were otherwise, it is obvious that there would be no stability in any transaction wherein one party gained an advantage, and the courts would be full of parties seeking to rectify their bad judgments by a recourse to law.

SECTION 3.—FRAUD

(A) In General

Fraud is any spoken or acted falsehood whereby one is induced to enter into what is in form a contract in the belief that it is a different thing from what it is. Like mistake, it affects the reality of consent of the parties.

Fraud may consist either in the statement of what is false, or the suppression of what is true. The statement of what is false is called misrepresentation; the suppression of what is true is called concealment. Mere silence will not, in the absence of a duty to speak, amount to fraudulent concealment. Thus passive concealment, or silence, is not fraud; but active concealment, consisting of statements or action calculated to cover up the concealed fact, will be grounds for avoidance of the contract.

In cases of fraud, the injured party may either (1) plead the fraud as a defense to an action by the other party for breach of contract; or (2) he may have the contract set aside on the ground of fraud and recover back the money paid or the property delivered; or (3) he may sue the person guilty of the fraud in a tort action for deceit, and recover a judgment for money damages.

The elements of fraud, all of which must be present, are as follows: (1) A false representation of an existing fact. (2) Knowledge, by the party making the assertion, that the fact stated is untrue. (3) Intention, by the party making the assertion, that the other party will act upon it. (4) The party to whom the false statement made must have been ignorant of its falsity; that is, he must have justifiably relied upon its truth. (5) The party defrauded must have suffered damage. Any material misstatement, knowingly made, with intent to influence another into entering into a contract, will, if believed and justifiably relied on by that other

to his damage, afford ground for rescission of the contract, or will constitute a good defense to an action thereon, or will be ground for a tort action for deceit.

The misstatement must be of fact, and not of mere opinion. Thus, to say, "This machine is worth $1,000," is regarded as a mere statement of opinion; but to say, "It is three years old, and I paid $2,000 for it, new," is, if untrue, a misrepresentation of a fact. In rare cases, statements as to value are deemed statements of fact, and not of opinion, at least where the parties do not have equal means of knowledge. So in one case, a statement, made in Chicago, that land in Minnesota offered for sale, was "worth $16,000," whereas in fact it was worth less than $3,000, was held to be a statement of fact, because "it was made with the intention that it should be so understood." [4]

(B) Misstatement Must Be of an Existing Fact, Not Intention

DAWE v. MORRIS.

Supreme Judicial Court of Massachusetts, 1889. 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404.[5]

Devens, J. The alleged misrepresentations of the defendant, by which the plaintiff avers that he was induced to enter into a contract for building thirty miles of the Florida Midland Railway, are that the defendant had purchased a certain quantity of rails at a certain price, and that he would sell those rails to the plaintiff at the same price if he would make such contract. The plaintiff's declaration alleges that the defendant had not then purchased the rails, and did not sell, and did not intend to sell, any rails * * * to the plaintiff; and that by reason of the contract into which the plaintiff was induced to enter, he was obliged to purchase a large number of rails at a much higher price than that named by the defendant, to his great injury. * * *

A representation, in order that, if material and false, it may form the ground of an action [to avoid a contract] where one has been induced to act by reason thereof, should be one of existing fact. [A statement promissory in its character has to do with something in the future, and is not properly a misrepresentation, but a promise.] The statement by the defendant that he would thereafter sell rails at a particular price if the plaintiff would contract with the railway company, was a promise [for the breach of which the plaintiff may obtain damages in an action thereon; but, as the basis of rescission for fraud, the facts as alleged are insufficient]. * * * Quite a different case would

4 Biewer v. Mueller, 254 Ill. 315, 98 N. E. 548 (1912).

5 Statement of facts is omitted

be presented if the defendant had falsely represented to the plaintiff, if unskilled in the price of rails, what their market value then was, and what was the price at which they could then be purchased. * * *

(C) Misrepresentation of Knowledge as Fraud

CHATHAM FURNACE CO. v. MOFFATT.

Supreme Judicial Court of Massachusetts, 1888. 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727.

Tort for false and fraudulent representations made by the defendant, whereby the plaintiff was induced to take a lease of a mine, and to purchase certain mining machinery. [Judgment for plaintiff.]

Allen, J. It is well settled in this commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not * * * a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must * * * be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not * * * excuse a statement of actual knowledge. * * *

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and débris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out, and visible when the bed was free from water and débris. [It appeared from the evidence that the representation was not true, but that the bed of ore was not in the land covered by the defendant's lease, but was in the adjoining mine; and the defendant's mine was in fact worked out.]

During the negotiations, the defendant exhibited to the plaintiff a plan of a survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this

erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true. * * *

[Judgment affirmed.]

(D) Concealment as Fraud

CROMPTON v. BEEDLE et al.

Supreme Court of Vermont, 1910. 83 Vt. 287, 75 A. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399.

[Bill by Cora E. Crompton against Albert H. Beedle and another, praying for a reconveyance of land deeded to defendants. Complainant tendered defendants the purchase price.]

Haselton, J. The oratrix in this cause, a resident of Worcester, Mass., sets out in her bill as amended that, at a time named, she was the owner in fee simple of a farm in Randolph in this state; that she purchased the farm for the use of a relative, and had herself never been in Randolph, and had never seen the farm and was ignorant of its true value; that there was and is an undeveloped and valuable granite quarry in and under the pasture of the farm, but that at the time named she had no knowledge of such quarry. She further sets out that at the time in question, which was October 22, 1908, the defendant Beedle, called upon her in Worcester and stated that he desired to buy the pasture mentioned and that she told him that she did not know the value of the pasture apart from the farm; that thereupon the defendant Beedle told her that the pasture was poor and of comparatively little value; that it adjoined some land that belonged to him, and that the only way of access to the pasture was over his land, and that it annoyed him and his family to have his land gone over for such access; and that that was the only reason why he desired to purchase the pas-

ture. * * * The oratrix further alleges that the defendants knew of the existence of the granite quarry, and knew that she was ignorant of its existence; that the representations made as above stated were false, and were known to the defendants to be false, and were fraudulently made for the purpose of inducing her to sell the farm to the defendants at a price much less than its true value, and for the purpose of inducing her to forbear inquiry as to the existence and value of the granite quarry, and as to the value of the farm as affected thereby; that the pasture was not, as represented, of little value, $400, but $15,000. * * *

In a case decided a few years later than Laidlaw v. Organ [2 Wheat. 178, 4 L. Ed. 214], Lord Eldon, in a carefully considered case, gave expression to the law here applicable. He said: "If an estate is offered for sale, and I treat for it knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate." Turner v. Harvey, Jacob, 169, 178. In Walters v. Morgan, 3 De G. F. & J. 718, Lord Chancellor Campbell expressed his full concurrence in the doctrine of Turner v. Harvey, and said that, not only a single word, but "a nod or a wink or a shake of the head, or a smile from the purchaser, might defeat the application of the principle that mere reticence on the part of a purchaser does not in law amount to fraud." * * * [In Mountain v. Day, 91 Minn. 249, 97 N. W. 883] the syllabus, by the court, is this: "An action will lie for fraudulent representations made by the prospective purchaser of land as to its value and condition, the land being at a distance from the place of purchase, and the vendor being ignorant as to its condition and value, and relying upon the truthfulness of such representations." * * *

Unfairness and fraud may be collected from a variety of circumstances, and it is ordinarily enough to establish fraud that a vendee has actively attempted to ensnare, and has in fact ensnared the vendor into the making of an unconscionable contract. Where concealment of an essential thing is effected by an industrious course of misleading and deceptive talk or conduct, there is fraud against which equity will relieve. The law distinguishes between passive concealment and active concealment. Where one has full information, and represents that he has, if he discloses a part of his information only, and by words or conduct leads the one with whom he contracts to believe that he has made a full disclosure, and does this with intent to deceive and overreach and to prevent investigation, he is guilty of fraud against which equity will relieve, if his words and conduct in consequence of reliance upon them bring about the result which he desires. * * *

The result is that the decree sustaining the demurrer and adjudging the bill insufficient is reversed, and the cause is remanded.

SECTION 4.—DURESS

In General.—We have seen that, where parties entering into an agreement are mutually mistaken as to the subject-matter, no contract results. We have also noted that, where one party is induced to enter into a contract through fraudulent misrepresentations, it may be set aside at his option. There yet remains to be considered the effect of duress and undue influence upon the essential requisite of free consent.

Definition.—Duress is a species of fraud, except that here *compulsion,* rather than deception, is the means used to induce the other party to enter into the contract. Duress may be defined as actual or threatened violence or imprisonment, by reason of which a person is forced to consent, in form, to what he otherwise would not.

Duress by Force.—Duress is of two kinds: (1) Duress by force; and (2) duress by threats. Duress by force includes both the actual application of unlawful force to a person, or to his near relative, thereby inducing the said person to agree to what he otherwise would not, and the unlawful physical restraint of a person, or his near relative, thereby inducing the person to pay money, deliver property, or enter into any contract, to secure his release, or the release of the near relative, from such restraint. This latter is called duress by imprisonment.

It is to be noted that the duress may be directed against the person himself, or against his near relative, such as wife, husband, parent, child, brother, or sister. The test of duress is subjective. Was the compulsion employed sufficient to overcome the will, not of a person of "ordinary" courage or firmness, but of the actor himself?

Duress by Threats.—In addition to duress by actual force or actual imprisonment, there may be duress by threats of the same. The threats may be against the promisor's own person, or against his near relatives, as mentioned above. Duress by threats of prosecution must be of prosecution for crime. Threats of civil suits could not constitute duress.

Effect of Duress.—Contracts entered into under duress are voidable at the option of the party intimidated. The party intimidated may obtain the following relief:

(1) He may have the contract rescinded in equity.

(2) He may set up the duress as a complete defense to an action at law on the contract.

(3) He may sue at law to recover any money or property paid under duress. The law implies a promise by the party guilty of the duress to repay that which was so obtained.

SECTION 5.—UNDUE INFLUENCE

In General.—In fraud, that which destroys the reality of consent necessary to form a contract is the deception by means of which the party defrauded is induced to enter into the agreement. In duress, the means used is intimidation or compulsion. In undue influence, it is the misuse of power held by one person over another. A presumption of undue influence will arise where the parties stand in confidential relations in which one naturally possesses an advantage over the other. In such case it will be necessary for the party seeking to hold the benefit of a contract or conveyance to show perfect fairness on his part and no abuse of power.

Mental Weakness.—In general, it is true that a person seeking to set aside a contract or conveyance of land on the ground of undue influence must prove that improper means were used; but, as indicated above, wherever circumstances give to one individual unusual power over the will and mind of another, the law will *presume* undue influence in the case of transactions to the great advantage of the superior and the corresponding disadvantage of the inferior. For example, where an old lady, past eighty, made a deed of land as a gift to her physician, a man who had for a long time been in constant attendance upon her, advising her in everything, it was held that these circumstances created a presumption of undue influence, and that, unless the grantee could rebut the presumption by proof of full disclosure, fair dealing, and absence of fraud and undue influence, the deed would be set aside.[6]

Family Relations.—Another class of circumstances which will raise the presumption that undue influence was used in procuring another to enter into a contract is where the party benefited stood in some such relation to the other as to render that other peculiarly subject to influence. Such relation existed in the example given above, and it also exists between husband and wife, parent and child, brother and sister, and to all cases where from age or character one member of the family exercises substantial authority over the others.

Fiduciary Relations.—Similarly, where one person stands in a confidential or fiduciary relation to another, a contract made between them is presumed invalid on the ground of undue influence. Thus a contract between a trustee and the beneficiary of the trust, or between a guardian and his ward, an attorney and his client, doctor and patient, etc., is looked upon with suspicion; and if the person in the position of confidence has greatly benefited, the courts will presume that he has used his power to his own advantage, and in order that the contract may stand he must show the contrary.

6 Du Bose v. Kell, 90 S. C. 196, 71 S. E. 371 (1911).

CHAPTER 6

CONTRACTS WHICH MUST BE IN WRITING

SECTION 1.—IN GENERAL

The five essentials to a contract illustrated in the preceding five chapters, namely, agreement, consideration, capacity, legality, and reality of consent, are the requisite elements of every enforceable contract, but in some contracts a sixth essential is necessary, in addition to the other five. This sixth essential, applying only to those certain kinds of contracts regarded by the legislative authority as of too great importance to be left to the "uncertain and slippery testimony of witnesses," is that the agreement must be *in writing and signed by the party to be charged*. The Statute of Frauds, originally enacted by the British Parliament in 1677, and subsequently included in the statutory law of all of the American states, provides that, of the many types of contracts which parties may enter into, six of these must be evidenced by a writing in order to be provable in court.

Effect of the Statute of Frauds.—An oral contract is quite as valid as a written one. The Statute of Frauds does not render any contract invalid or void because not in writing; it merely provides that, to prove certain kinds of contracts in court, a writing will be necessary. In other words, to prove the existence of the kinds of contracts enumerated in the statute, written evidence must be produced rather than oral.

The Statute of Frauds applies only to actual contracts of the parties; it does not include the so-called contracts implied in law, or quasi contracts. Thus, if an oral contract to which the statute applies has been executed or performed on one side, as where a purchaser of land has paid over the purchase price, he may sue in quasi contract to recover the money, if the seller, relying on the statute, refuses to perform his oral contract to convey.

Contracts Within the Statute of Frauds.—Prior to the enactment of the Statute of Frauds, all contracts could be proved by oral evidence. It was found, however, that certain kinds of contracts were of too great importance to be left to the uncertain proof of witnesses, and for these classes of contracts the statute provides that only written evidence may be admitted to prove them. Contracts for the sale of personal property above a certain amount; contracts for the sale of real property; contracts of suretyship; contracts in consideration of marriage; and

all contracts not to be performed within one year—are the most important classes of agreements which the statute provides must be in writing.

The first Statute of Frauds was passed in England in the seventeenth century, and it has been in substance re-enacted in all the states of the United States. The fourth and the seventeenth sections of the Statute of Frauds contain the provisions in which we are interested.

"Section 4. No action shall be brought to charge any executor or administrator on any special promise to answer damages out of his own estate; (2) or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands or any interest therein; (5) or upon any agreement that is not to be performed within one year of the making thereof; unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged, or by some person thereunto by him lawfully authorized."

"Section 17. No contract for the sale of any goods, wares, and merchandises for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the party to be charged, or their agents thereunto lawfully authorized." [1]

SECTION 2.—CONTRACTS FOR THE SALE OF PERSONAL PROPERTY

(1) What are Goods, Wares, and Merchandise?

BROWN & HAYWOOD CO. v. WUNDER.

Supreme Court of Minnesota, 1896. 64 Minn. 450, 67 N. W. 357, 32 L. R. A. 593.

Canty, J. This is an action for damages for loss of plaintiff's anticipated profits, caused by the breach by defendant of an executory agreement between the parties. Defendant was about to bid for a contract to rebuild a burnt portion of a building in Minneapolis, and received from plaintiff the following proposition to furnish the glass for

[1] The Uniform Sales Act, adopted by many of the states, contains a section (section 4) which restates the above-quoted section of the English Statute of Frauds relating to sales of personal property, fixing the amount at $500, and also substituting for "goods, wares and merchandises," the phrase "goods or choses in action"; so that the assignment of a claim against another of the value of $500 or upwards is within the Statute of Frauds in all states wherein the Sales Act is law.

the same: "Minneapolis, Minn., Feb. 6th, 1894. John Wunder, Esq., City—Dear Sir: We will furnish all plate glass, double-strength glass, beveled plate, set in metallic sash, and crystalline glass, as per plans and specifications, for the burnt portion of the Syndicate Block, set complete in place, for thirty-one hundred dollars. This includes glass for water closets and crystalline glass in skylights; also, mirrors around show-window posts. Yours, faithfully, Brown & Haywood Co." The evidence tends to prove that defendant then and there orally promised plaintiff that, if he should be awarded the contract to reconstruct such portion of the building, and plaintiff's bid for the glass work was the lowest received by him, he would award the glass work to plaintiff; that the contract for reconstruction was so awarded him, and plaintiff's bid for the glass work was the lowest, but that he refused to permit plaintiff so to furnish the glass work, and let the furnishing of the same to others. On the trial the jury found for plaintiff in the sum of $325, and from an order denying a new trial, defendant appeals.

The only question raised on this appeal is that defendant's verbal promise to award the contract for the glass work to plaintiff is void under the statute of frauds. Gen. St. 1894, § 4210, provides: "Every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, shall be void, unless—First, a note or memorandum of such contract is made, in writing, and subscribed by the parties to be charged therewith," or unless there has been a part performance. It is contended by appellant that this contract is one for the sale of goods and chattels, and therefore within the statute. We cannot so hold. In our opinion, it appears, from the evidence, to be a contract for the manufacture of articles of special and peculiar design, not suitable for the general trade. Such a case is not within the statute. Browne, St. Frauds, §§ 304, 305, 307, 308; 1 Reed, St. Frauds, § 247; Phipps v. McFarlane, 3 Minn. 109 (Gil. 61). The testimony tends to prove that, in the usual course of business, the glass is carried in stock in sheets of standard sizes, and is cut up to fit the particular sash frames. The witness Brown testified:

"Q. Now explain these bevel-plate transoms, Mr. Brown,—what they are and what you do to them. A. In those, in the case of metallic sash and beveled plate, we cut the plate to the smaller shapes; that is, I think, in this case, a triangular, or, possibly, a square. We cut them with a diamond, and send them upstairs to the beveling department, and they grind these edges over a succession of wheels resembling grindstones. Some are coarser and some are finer. They pass over two or three wheels, and, after they have been ground on those wheels, they are polished off on the ruble wheel, which gives them a final smoothing and polishing. After they are prepared in that way, then we get this metallic sash bar, and we now have a machine which cuts it off into suitable lengths to put this glass together with, and then those joints are all soldered, cemented, and cleaned. Q. Well, the result of that work, when it is done, is to give you a window of a certain size, made up of small pieces of glass, with the necessary rims of metal, or something of that sort? A. The metal and beveling. The beveling is the important

item. * * * In regard to the item of $431 for the beveled plate, the labor in that particular item would, perhaps, be $300. In regard to the item of chipped glass of $450, the labor would, perhaps, cost from $100 to $150. We estimated the work of setting all the glass in the building to be $200. * * * The performance of the contract required us to come there and put these plates of glass in the apertures or frames that were prepared by the contractors. * * * As regards the plate glass, the sash are usually in place in the building, so that, when the glass is put in, the building is inclosed. * * * In my estimate I figured the plate glass at $671, and that included ten per cent. for cutting and waste."

Not only was this a contract to manufacture articles of a special and peculiar design, not suitable for the general trade, but it appears from the contract that the glass was to be "set complete in place." Then it was a contract to make improvements on the land, to erect portions of a building attached to the realty, not to sell chattels. Such a contract is not within the statute. Benj. Sales (6th Ed.) § 108.

This disposes of the case, and the order appealed from is affirmed.[2]

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(2) What is Receipt and Actual Acceptance?

GABRIEL v. KILDARE ELEVATOR CO.

Supreme Court of Oklahoma, 1907. 18 Okl. 318, 90 P. 10.

Action by the Kildare Elevator Company against Joseph Gabriel. Judgment for plaintiff, and defendant brings error.

BURFORD, C. J. * * * The cause of action is one to recover damages for the breach of an oral agreement to deliver corn. The plaintiff below, the Kildare Elevator Company, alleged that it entered into an oral agreement with the defendant Gabriel, by which he agreed to sell and deliver to the Kildare Elevator Company 200 bushels of ear corn at 30 cents per bushel, and 1,000 bushels of shelled corn at 31 cents per bushel; that pursuant to said agreement Gabriel delivered 52 bushels of corn, which was accepted and paid for at the agreed price; that Gabriel then refused to deliver any more of the corn, although the company was able, ready, and willing to take and pay for the same; that the plaintiff was damaged by such failure in the sum of $100, for which judgment was prayed. The cause was tried to a jury in the dis-

[2] Whether an agreement should be considered as a contract for the sale of goods, within the meaning of the Statute of Frauds, or a contract for labor and materials, and therefore not within that statute, is often a difficult question. A contract for the sale of articles then existing, or such as the seller ordinarily manufactures for the trade although not at the time existing, is a contract for the sale of goods to which the statute applies. But where the goods are to be manufactured in the future, to the special order of the buyer and particularly for him, the case is not within the statute, for the contract is not for the sale of goods but of labor and materials. Building contracts are therefore not within the operation of the Statute of Frauds.

trict court and a verdict was returned in favor of the plaintiff and judgment entered for $55 and costs. This proceeding is to reverse that judgment.

The plaintiff in error contends that the petition is fatally defective for two reasons: First, that the contract was within the statute of frauds, and the subsequent delivery and acceptance of part of the corn did not operate to take the contract out of the statute; and, second, that no sufficient allegations of damages are set out to entitle the plaintiff to recover. We think there is no merit in either contention. Our statute (section 780, Wilson's Rev. & Ann. St. 1903, p. 312) provides: "The following contracts are invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged, or his agent. * * * Fourth: An agreement for the sale of goods, chattels, or things in action, at a price not less than fifty dollars, unless the buyer accept or receive part of such goods and chattels, or the evidences or some of them, of such things in action, or pay at the (time) some part of the purchase money. * * *"

This provision has been construed by almost every American court of last resort, and the authorities are uniform, to the effect that a delivery of any portion of the goods or chattels contracted for at any subsequent time and their acceptance makes the contract an enforceable one. In 1 Mechem on Sales, § 401, it is said: "It is not essential that the part delivery, acceptance, and receipt should be at the time of making the contract. The parol agreement, unless revoked, may stand for a mutual agreed proposition, at least for a reasonable time, where none is fixed, and the subsequent acceptance and receipt, while the proposition remains open, of a portion of the goods which were the subject of the parol negotiation, will make the entire contract effective."

In Rickey v. Tenbroeck, 63 Mo. 563, the contract was an oral one for the sale of a lot of cattle, part to be delivered in one week and the remainder in installments as the buyer might require; and the court held that, though the contract was void under the statute, it was a good proposition concerning the price and the subsequent delivery and acceptance of the first installment without any change in the agreement, made it binding, and took it out of the statute. In Farmer v. Gray, 16 Neb. 401, 20 N. W. 276, the court held that, where the contract is entire, the acceptance and receipt of a part of the goods will validate the entire contract. In Gilbert v. Lichtenberg, 98 Mich. 417, 57 N. W. 259, there was a sale of three car loads of onions, and it was held that the delivery and acceptance of one car load after the contract was made satisfied the statute as to the whole transaction. In Slater Brick Co. v. Shackleton, 30 Mont. 390, 76 P. 805, the Supreme Court of Montana said: "The receipt and acceptance of the property sold need not be concurrent with the time of sale, but may occur at any time thereafter." Also: "If the defendants took the place of White & Co., and received and accepted a portion of the goods and paid a portion of the price, the contract was equally placed beyond the statute. The Supreme Court of Idaho in Coffin et al. v. Bradbury et al., 3 Idaho, 770, 35 P. 715, 95 Am. St. Rep. 37, said: 'Receipt and acceptance of the property

sold at any time after making the contract takes the contract out of the statute of frauds.'" * * *

The acceptance and receipt need not be contemporaneous with the making of the agreement, but may take place at any time before the contract is sought to be enforced. * * *

[Judgment affirmed.]

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(3) What will Constitute Part Payment?

GROOMER v. McMILLAN.

Kansas City Court of Appeals, Missouri, 1910. 143 Mo. App. 612, 128 S. W. 285.

Ellison, J. Plaintiff brought this action to charge defendant with damages on account of a breach of a contract of sale of cattle. He recovered judgment in the trial court.

The contract was verbal, and the cattle largely exceeded the value of $30. For that reason defendant interposed the statute of frauds (section 3419, Rev. St. 1899 [Ann. St. 1906, p. 1963]), which provides that no verbal contract for the sale of goods, wares, and merchandise, for a price of $30 or more shall be allowed to be good unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment. But plaintiff claims that he made a payment at the time of making the contract, by giving to defendant his check on a bank for $100. His testimony on this head was as follows: "I came back to where he (defendant) was plowing corn, and told him I would take the cattle, and would state the contract over so there would be no mistake; I was to have the cattle at my request the last half of September, any time I called for them after the 15th. They were to be driven to Mr. John Graham's and weighed, at $4 per hundred, the shrink to be 3 per cent. He (defendant) said, 'Yes.' I wanted to know if a check for $100 would be money enough, and he said it would. I wrote him out a check for $100 and put on the check, 'For twenty steers.' I asked him if that check was all right, and he said it was. Then I turned back and come home." Defendant kept the check for several weeks, and finding he and plaintiff were at a misunderstanding as to the obligations of the contract, he tore it up in plaintiff's presence and threw the pieces on the ground.

In our opinion this evidence did not show a payment. The law is that the payment, to be effective in avoidance of the statute of frauds, must be an absolute payment. But it need not be in money. The buyer's check for the money will suffice if it is received by the seller and agreed that it is an absolute payment; and this must be clearly established. For "nothing is better settled than that a check is not payment, but is only so when the cash is received on it." * * *. A note given for the amount of an account will not extinguish the latter unless there is an express agreement that it shall so operate. [Cases cited.]

From the foregoing it is plain that the burden was upon the plaintiff to clearly show that it was expressly agreed by defendant that the check was taken as an absolute payment and discharge of the price of the cattle pro tanto. It is equally clear that the acceptance of the check and holding it (there being no loss to plaintiff by reason of such holding) does not establish an agreement that it was considered a payment in fact. * * *

The statute requires that there shall be a payment on the price. And it must be remembered that this is a requirement of the law as a matter of public policy, and it can neither be waived nor evaded by the parties. If the creditor accepts something other than money, it must be agreed and understood that it is in absolute payment and discharge of the price. Otherwise the statute is of no force or effect. A seller of personal property desiring to make a valid contract under the provision of the statute of frauds, with a buyer who has no money with him, might expressly agree with the latter to take his check in absolute discharge of that much of the purchase price. But, if he did so, he would have to take the risk of getting the money, provided, of course, the buyer had funds and a right to draw the check at the time he delivered it. For if he had no right to draw it, that would be a fraud on the seller, and his agreement to accept it as a discharge of the debt would be avoided. * * *

Plaintiff insists that the check if not a part payment, was at least "something in earnest to bind the bargain." We think not. Whatever may have been the meaning of the word "earnest," its statutory meaning is part payment. Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306; Hudnut v. Weir, 100 Ind. 501. "It must be a real payment." 1 Reed, Statute of Frauds, § 229. "Earnest" seems understood to be a part of the price. So Blackstone (Book 2, 447) says the sale is not good unless the vendee "gives part of the price to the vendor by way of earnest to bind the bargain."

Plaintiff also suggests that "live cattle" are not embraced within the statutory words "goods, wares, and merchandise." We think they are.

From the foregoing observations it would seem to be apparent that the evidence wholly failed to show such an acceptance of the check as the law requires, and the judgment is therefore reversed. All concur.

SECTION 3.—CONTRACTS FOR THE SALE OF LANDS

ROSENSTEIN v. GOTTFRIED.

Supreme Court of Minnesota, 1920. 145 Minn. 243, 176 N. W. 844.

HALLAM, J. Plaintiff is in the business of buying and wrecking old buildings. Defendant was the owner of a lot on which was situated a two-story, twelve-room, frame dwelling, on a stone foundation. Plaintiff claims that defendant told him she wanted to dispose of the building

for wrecking, that he looked it over and offered her $110 for all the material in the building, plaintiff to tear down the building and take the material away. [It appears from the facts that the defendant orally accepted this offer, and that plaintiff paid her $5 to bind the bargain. This action is for breach of the parol contract; and the defense pleaded is the statute of frauds.] * * *

Plaintiff contends * * * that [this] was not a sale of an interest in land, which must, under the statute of frauds, * * * be evidenced by a writing, but a sale of personal property, * * * and since part payment was made, no writing was required. The trial court, on the trial, treated the transaction as a sale of personal property, and instructed the jury that if plaintiff's version of the transaction was true and the $5.00 was paid they should find for plaintiff. On further consideration the court was of the opinion that it was a sale of an interest in land and void because not in writing.

We agree with the conclusion of the trial court. There is much confusion in the decisions as to when a sale of things attached to land, but which are to be removed, is to be considered a sale of land, and when a sale of personal property.

It is quite generally held that a contract to sell things affixed, but which the seller is to detach and pass title after separation, is an executory contract to sell personal property. * * * Some decisions hold that a contract may partake of that nature, if the parties so intend, even though the buyer is to make the separation, and that the fact that the vendee is to make the separation is important only as bearing on the intent of the parties as to when title is to pass. Wetkopsky v. New Haven Gas Light Co., 88 Conn. 1, 90 A. 30, Ann. Cas. 1916D, 968. * * * [Whatever may be the opinion of other jurisdictions on the question] we are of the opinion that there is but one safe or satisfactory rule to apply, * * * and that is to hold that a sale or a contract of sale giving to the buyer a present interest [in a building permanently affixed to the realty] is a sale of an interest in land, which under our statute must be in writing. This we think is in accord with the weight of authority. [Cases cited.]

We hold that since there was no writing there was no binding contract and plaintiff has no property rights in the building. * * *

Judgment affirmed.[3]

[3] Life estates, leaseholds, easements of all kinds, ore and coal while in the ground, standing timber, growing grass, uncut ice, etc., are all types of interests in land and can be sold only by a writing.

MILLER v. BALL.

Court of Appeals of New York, 1876. 64 N. Y. 287.

Appeal from judgment of the General Term of the Supreme Court in the Third Judicial Department, affirming a judgment in favor of plaintiff. * * *

This action was brought to compel a specific performance of an alleged parol contract for the sale of land.

[The referee found in substance the following facts: That plaintiff made a verbal contract with defendant for the purchase of fifty acres of land at three dollars an acre; that the said purchase price was paid by the plaintiff to the defendant; that the plaintiff entered upon the land, cut and constructed a road thereto across the adjoining land of other parties, underbrushed and cut up fallen trees, preparatory to clearing about a quarter of an acre of land, built a bough shanty, and since that time and down to the commencement of this action he continued in the occupancy of the said lot, cutting trees and timber upon it, and paying the taxes thereon, and also continued to labor and improve the roads upon the lot and those connecting the same with the public highway.]

EARL, J. We will assume, for the present purpose, that there was not a sufficient note or memorandum of the agreement between the parties to satisfy the requirement of the statute of frauds, and we still reach a conclusion adverse to the appellant. * * *

It is not always easy to determine whether there has been sufficient part performance of a parol agreement for the sale of land in the sense of courts of equity to free [the contract] from the operation of the statute of frauds. [The general rule is that the part performance must be sufficient so that refusal to perform the agreement by the other party will operate as fraud. The statute of frauds was enacted to prevent fraud, not to permit it. Therefore courts of equity, though not courts of law, have adopted the principle that a sufficient part performance of an oral contract for the sale of land will operate to take the contract out of the statute.] Taking possession under a parol agreement, with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute. * * *

The payment of the consideration alone, in a case where its recovery in an action at law would fully indemnify the party paying, would not be a sufficient part performance within the rule, * * * and neither would mere possession be, without any other circumstance of hardship or fraud. [But payment of part of the purchase price, and possession under the agreement, coupled with such facts as the making of lasting and valuable improvements, are generally considered in equity as sufficient part performance to take the contract out of the statute and make it enforceable though oral.] Here the whole consideration money was paid, and the plaintiff took all the possession of such a lot which is

ordinarily practicable. He built roads to it and upon it; built a shanty and made some clearing. His improvements thus made were probably equal in cost to the consideration paid for the lot, and that cost would be lost to him unless the defendant be compelled to perform his agreement. He paid the taxes, and the money thus paid he cannot recover back. I am therefore of opinion that enough was done by the plaintiff to bring his case within the equitable rule as to part performance. * * *

Judgment affirmed.

SECTION 4.—CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR

WARNER v. TEXAS & P. RY. CO.

Supreme Court of the United States, 1896. 164 U. S. 418, 17 S. Ct. 147, 41 L. Ed. 495.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

This was an action brought May 9, 1892, by Warner against the Texas & Pacific Railway Company, a corporation created by the laws of the United States, upon a contract made in 1874, by which it was agreed between the parties that, if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails, and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral, and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands." * * *

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

The statute of frauds of the state of Texas, re-enacting, in this particular, the English statute of 29 Car. II, c. 3, § 4 (1677), provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized." Tex. St. Jan. 18, 1840. * * *

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and

be expected by the parties to extend, and did in fact extend, beyond the year.

The several states of the Union, in re-enacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. * * *

In Roberts v. Rockbottom Co., 7 Metc. (Mass.) 46, Chief Justice Shaw declared the settled rule to be that, "when the contract may, by its terms, be fully performed within the year, it is not void by the statute of frauds, although in some contingencies it may extend beyond a year"; and stated the case then before the court as follows: "The contract between the plaintiff and the company was that they should employ him, and that he should serve them, upon the terms agreed on, five years, or so long as Leforest should continue their agent. This is a contract which might have been fully performed within the year. The legal effect is the same as if it were expressed as an agreement to serve the company so long as Leforest should continue to be their agent, not exceeding five years; though the latter expression shows a little more clearly that the contract might end within a year, if Leforest should quit the agency within that time."

In Blanding v. Sargent, 33 N. H. 239, the court stated the rule, as established by the authorities elsewhere, and therefore properly to be considered as adopted by the legislature of New Hampshire when re-enacting the statute, to be that "the statute does not apply to any contract, unless by its express terms or by reasonable construction it is not to be performed—that is, incapable in any event of being performed —within one year from the time it is made"; and that "if, by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary"; and, therefore, that an agreement by a physician to sell out to another physician his business in a certain town, and to do no more business there, in consideration of a certain sum to be paid in five years, was not within the statute, because, "if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed." The decisions in other states are to the same effect. * * *

In Saunders v. Kasterbine, 6 B. Mon. 17, cited by the defendant in error, the contract proved, as stated in the opinion of the court, was to execute a bill of sale of a slave when the purchaser had paid the price of $400, in monthly installments of from $4 to $8 each, which would necessarily postpone performance by either party beyond the year.

In Railway Co. v. Whitley, 54 Ark. 199, 15 S. W. 465, a contract by which a railway company, in consideration of being permitted to build its road over a man's land, agreed to construct and maintain cattle guards on each side of the road, was held not to be within the statute, because it was contingent upon the continuance of the use of the land for a railroad, which might have ceased within a year; * * * and,

in another case, that a contract, made early in November, 1869, to furnish all the stone required to build and complete a lock and dam which the contractor with the state had agreed to complete by September 1, 1871, was not within the statute, because the contractor, by pushing the work, might have fully completed it before November, 1870. McPherson v. Cox, 96 U. S. 404, 416, 417, 24 L. Ed. 746; Walker v. Johnson, 96 U. S. 424, 24 L. Ed. 834. * * *

In the case at bar, the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that, if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a sawmill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

The parties may well have expected that the contract would continue in force for more than one year. It may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which, in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties, nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

The contract of the railroad company was with, and for the benefit of, the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it," and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth or in the mind of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an "agreement which is not to be performed within the space of one year from the making thereof."

Nor is it within the other clause of the statute of frauds, relied on in the answer, which requires certain conveyances of real estate to be in writing. The suggestion made in the argument for the defendant in error, that the contract was, in substance, a grant of an easement in

real estate, and as such within the statute, overlooks the difference between the English and the Texan statutes in this particular. The existing statutes of Texas, while they substantially follow the English statute of frauds, so far as to require a conveyance of any "estate of inheritance or freehold, or for a term of more than one year, in lands and tenements," as well as "any contract for the sale of real estate, or the lease thereof for a longer term than one year," to be in writing, omit to re-enact the additional words of the English statute, in the clause concerning conveyances, "or any uncertain interest of, in, to, or out of" lands or tenements, and, in the other clause, "or any interest in or concerning them." St. 29 Car. II, c. 3, §§ 1, 4; Rev. St. Tex. 1879, arts. 548, 2464; Pasch. Dig. arts. 997, 3875; James v. Fulcrod, 5 Tex. 512, 516; Stuart v. Baker, 17 Tex. 417, 420; Anderson v. Powers, 59 Tex. 213.

Judgment reversed, and case remanded to the circuit court, with directions to set aside the verdict, and to order a new trial.

SECTION 5.—CONTRACTS OF GUARANTY

The Statute of Frauds provides:

No action shall be brought whereby * * * to charge the defendant upon any special promise to answer for the debt or default of another unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him authorized.

A contract to answer for the debt or default of another must therefore be evidenced by a writing in order that it be enforceable. The difficulty here is in distinguishing between promises that are original and those collateral to the debt of the other person. If the former, obviously that promise would not be within the statute.

A collateral promise, in the first place, of necessity implies a debt of another person to which it relates. If one person says to another, "Deliver goods to A, and I will pay you," the verbal promise is original, and not within the statute, for A owes no debt to the party who furnishes the goods. But if, instead of saying, "I will pay you," he says, "I will see you paid," or "I will pay you if A does not," or uses equivalent words showing that the debt is in the first instance the debt of A, the promise is collateral, and not valid unless in writing.

In the second place, a promise to be collateral must be so, not only in form, but in actuality. The real purpose of the promisor is the test. If the leading object of the promise is simply to become surety or guarantor to the promisee, for another's debt, then in form and sub-

stance the promise is collateral. But if the real purpose of the promisor is to subserve some pecuniary interest of his own, then the promise, though collateral in form, is in reality original, and not within the statute.

This section of the Statute of Frauds is of particular interest to those connected with construction work. Cases often arise where a contractor or subcontractor fails to pay for labor or materials, and the owner verbally agrees to pay therefor, so that the work may continue. Where the owner thus assumes the obligation his promise is original and not within the statute.

Although the difference between original and collateral promises is sometimes clearly discernible, often the question is one of considerable doubt. Therefore the only safe procedure is to see that promises which in form answer for another's debt are in writing, and thus remove one cause of possible litigation.

BICE et al. v. MARQUETTE OPERA-HOUSE BLDG. CO.

Supreme Court of Michigan, 1893. 96 Mich. 24, 55 N. W. 382.

LONG, J. On August 4, 1890, the defendant company entered into a contract with Wilson & Moore [general contractors] by which they were to erect for defendant an opera house building for the sum of $45,000, to be completed by July 1, 1891. The contract provided that, should the contractors at any time refuse or neglect to supply sufficient material of the proper quality or fail in any respect to prosecute their work with promptness, * * * such failure being certified by the architect, the owners [the Marquette Building Company] should be at liberty to supply the material, etc., and deduct the costs of the same from any moneys due or to become due to the contractors.

[The plaintiffs, Bice, Pendill & Co., were materialmen under contract with Wilson & Moore to furnish the materials for the building. Under the contract the firm of Bice, Pendill & Co. furnished material up to March 1, 1891, when they refused to furnish any more material upon the credit of Wilson & Moore, unless the owners, defendants herein, should pay them directly therefor.] Mr. Pendill called upon the architect, Mr. Charlton, and stated to him that they declined to furnish more materials unless they could see their way to get their pay. Mr. Charlton, who audited all the bills, advised Pendill that, if he would get an order from Wilson & Moore, he would have the estimates made directly to the firm of Bice, Pendill & Co. The order was given by Wilson & Moore upon the defendant [and Mr. Charlton agreed to make the payments directly to Bice, Pendill & Co.] The whole of the materials were thereafter furnished. * * *

This action is brought against the defendant company for the amount of the claim of Bice, Pendill & Co. for such materials. * * * [The defense was that the promise was to answer for the debt of Wilson &

Moore, and therefore unenforceable under the statute of frauds.] On the trial before a jury the plaintiffs had verdict and judgment for the amount of the claim. The court directed the jury that it was not claimed on the part of the plaintiffs that the defendant company purchased the materials from them. * * * "Did the defendant make the agreement that is claimed by the plaintiffs? * * * That is, did the defendant agree to pay direct to Bice, Pendill & Co.? * * * If you find that such agreement was made, the court advises you that it was not within the statute of frauds."

Substantially, the court advised the jury that, if such an arrangement was made with the architect as plaintiffs claimed, and the architect had authority to buy materials, and pay for materials furnished by plaintiffs to Wilson & Moore, the plaintiffs might recover. * * *

The defendant company had a right, under its contract with Wilson & Moore, at any time when the contractors failed to prosecute the work with diligence to provide materials themselves, and deduct the cost from the moneys due on the contract. * * * [Therefore] when the defendant company found that plaintiffs would furnish no more material to Wilson & Moore, or upon their credit, it agreed to make the payments for such material directly to plaintiffs. The case, in principle, falls within the rule laid down in Calkins v. Chandler, 36 Mich. 324, 24 Am. Rep. 593. * * * [It was not a promise to pay the debt of another, but in substance an original promise to pay plaintiffs for material furnished.] As was said by Chief Justice Shaw in Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148: "The rule to be derived from the decisions seems to be this: That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of a person or property of the debtor, or other forbearance or benefit to him, it is within the statute."

The object to be accomplished by the defendant company was the immediate acquisition of those materials to put into the building. [The purpose was to secure a benefit to the defendant company. It matters not that Wilson & Moore remain liable to Bice, Pendill & Co. for the materials furnished; the promise of the defendants to pay therefor is an original promise and not within the statute of frauds.] * * *

The judgment must be affirmed with costs.

SECTION 6.—CONTRACTS OF EXECUTORS AND ADMINISTRATORS

The Statute of Frauds provides:

No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

An executor or administrator is the personal representative of the deceased. An administrator is appointed by a probate court to administer the estate of a decedent who has left no will. An executor is named by the testator in the will, and is confirmed in the appointment by the court. Except for this difference in the source of their authorization, there is no difference between the two; their duties are the same. An executor or administrator may sue or be sued upon debts owed by or to the deceased's estate. He is charged with the duty of discharging the deceased person's existing debts, and distributing the balance of the estate to the beneficiaries under the will or to the heirs, if there is no will. In no case except where his promise is in writing, is he bound to pay anything out of his own pocket. His liabilities are limited by the assets of the deceased person.

The statute does not apply to promises of an executor or administrator to pay debts of the decedent out of the assets of the estate, but only to pay out of his own funds. Also it applies only to the decedent's existing debts. Thus a promise by an executor to pay an heir money if he will forbear opposition to the probate of the will is an original promise not within the statute, and enforceable though oral.

SECTION 7.—CONTRACTS IN CONSIDERATION OF MARRIAGE

The Statute of Frauds provides:

No action shall be brought to charge any person upon any agreement made upon consideration of marriage unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

This clause of the statute does not apply to mutual promises to marry; these, though oral, are enforceable. It applies rather to promises to pay money, or to make a settlement of property, if a marriage is consummated. Because the amount of money or property involved is likely to be large, and because false testimony as to the terms of such promises might frequently be made, this class of agreements was included among those contracts not enforceable unless in writing.

CHAPTER 7

THE PERFORMANCE OF CONTRACTS

SECTION 1.—BREACH OF CONDITION PRECEDENT AS EXCUSE FOR NONPERFORMANCE

We have considered in the preceding six chapters the six elements essential to the formation of a binding contract. There yet remains the subject of performance and breach. What are the rights and liabilities of the parties in case of a breach, or failure to perform? Where each party fully performs those acts which he has promised to perform, the contract is executed or discharged. But if one of the parties fails to perform at all, or performs only partially, what remedy will the law afford the other party to the contract?

The general rule is that for any breach of contract, for any failure to perform the act promised, the party in default will be held liable in damages. No matter how trivial the breach, the law will award damages to the aggrieved party. Furthermore, in cases where the breach is a very serious one, the law will excuse the aggrieved party from the performance of his duty under the contract, in addition to giving him an action for money damages. Thus a breach of contract by one party may discharge the other from all further liability thereunder. It is our purpose in this chapter to discover under what circumstances a party may be relieved from his contract by reason of a breach by the other party.

If the promise of one party to a contract is a conditional promise—that is, if his duty of performance is not absolute, but is conditioned upon the duty of performance of the other party—then quite clearly, if the other does not perform, the first party need not perform. When A promises to pay B $25 to dig a ditch, all would agree that until B had dug the ditch A would be under no duty to pay the money. A's promise is conditioned upon the performance of B's promise. B's duty to dig the ditch is said to be a *condition precedent* to A's duty to pay the money; precedent because it precedes A's duty in point of time.

A statement of the effect of breach is as follows:

(1) The breach of any term of a contract gives the other party a right of action for damages.

(2) The breach of a condition precedent, in addition to a right to damages, excuses the other party from his duty of performance under the contract.

In many of the cases following, the plaintiff is suing the defendant for his breach of contract. The defendant pleads that he is no longer under a duty to perform because of some prior breach of the contract by the plaintiff, and the issue is joined on the question whether the particular breach of which the plaintiff is guilty was or was not a condition precedent to defendant's liability. If it was a condition precedent, the plaintiff cannot now recover, for by such a breach the defendant is excused from the contract. If it was not a condition precedent, the defendant was not excused and will have to perform, being entitled only to money damages for plaintiff's breach.

What, then, will amount to the breach of a condition? The cases which follow contain the general principles upon which the answer to this question depends. These cases illustrate the legal effect of the clauses generally contained in construction contracts. As will be discovered from an analysis of the cases, conditions may be of two kinds, express and implied. The parties may by express language make the performance by one party of any term of the contract a condition to the whole duty of performance by the other party. If they have done so, the breach of such term, no matter how slight, will operate to excuse the other party from carrying out his part of the contract, and give him a right to damages. If they have not done so, still, where there has been a serious or material breach of a material or important term of the contract, the court will say that the implied intention of the parties was that this was to be considered the breach of a condition precedent, it being the thing bargained for, and will declare the injured party thereby excused from the contract and entitled to damages. We shall consider separately express and implied conditions precedent.

(A) Express Conditions Precedent

(1) Arbitration Clauses as Conditions

"* * * In the event that the owner and contractor shall fail to agree on any question of fact arising out of this contract, the matter shall be referred to a board of arbitration, to consist of one person selected by the owner and one by the contractor, the two to select a third. The decision of this board shall be final and binding on both parties hereto. NO ACTION SHALL BE MAINTAINED ON THIS CONTRACT, EXCEPT AFTER AN AWARD FIXING THE AMOUNT OF THE CLAIM, AS PROVIDED BY THE AGREEMENT TO ARBITRATE. (From standard form of construction contract.)

ANDERSON et al. v. ODD FELLOWS' HALL OF JERSEY CITY.

Court of Errors and Appeals of New Jersey, 1914. 86 N. J. Law, 271, 90 A. 1007.

[Action by John B. Anderson and others against the Odd Fellows' Hall of Jersey City. Judgment for defendant, and plaintiffs appeal.]

BERGEN, J. This action was instituted to recover the value of extra work and materials furnished by the plaintiffs, in excess of what a contract between the plaintiffs and defendant for the construction of a building required. The plaintiffs had judgment in the district court for $297, and the defendant appealed to the Supreme Court, where the judgment below was reversed, and a judgment of nonsuit ordered entered in the district court for two reasons, the first being that a covenant contained in the contract requiring arbitration in certain matters, was a condition precedent, and that without its performance the plaintiffs could not recover. * * * In our opinion, the covenant for arbitration contained in this contract is not a condition precedent to an action for the recovery of the extra work sued for.

The contract on this subject provides that: "No alteration shall be made in the work except upon written order of the committee, the amount to be paid by the owner, or allowed by the contractors by virtue of such alterations, to be stated in said order. Should the owner and the contractors not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree the determination of said amount shall be referred to arbitration as provided for in article 12 of this contract."

Article 12 provides that: "In case the owner and contractors fail to agree in relation to matters of payment, allowance, or loss referred to in articles 3 or 7 of this contract, or should either of them dissent from the decision of the committee referred to in article 7 * * * the matter shall be referred to a board of arbitration, to consist of one person selected by the owner and one person selected by the contractors, these two to select a third. The decision of any two of this board shall be final and binding on both parties hereto."

The condition to arbitrate, as expressed in this contract, is not, by its terms, made a condition precedent to an action to recover for extra work. It is nothing more than an agreement to arbitrate disputes regarding the amount to be allowed for extra work ordered and performed, in cases where the parties cannot agree, revocable at any time before it is fully executed and an award made, and the bringing of a suit amounts to a revocation. Reed v. Washington Ins. Co., 138 Mass. 572.

In the case of Wolff v. Liverpool & L. & G. Ins. Co., 50 N. J. Law, 453, 14 A. 561, the agreement contained a stipulation that no action should be maintained until after an award be obtained fixing the amount of the claim, as provided by the agreement to arbitrate. This was held to be a condition precedent, but Chief Justice Beasley, who delivered the opinion of the court, distinguished such condition from a case where the agreement merely declares that, if the parties shall disagree as to

the amount, such difference shall be arbitrated, which is the situation in the present case, for there is here no contract that the amount shall not be recoverable by suit until after arbitration, or the recovery limited to a sum to be fixed by arbitrators, or that arbitration shall be a condition precedent to a right of action, and therefore the arbitration covenant in this contract is not a condition precedent. * * *

The weight of authority favors the rule that, where the contract provides for submission to arbitration of matters of dispute arising under it, such agreement is a condition precedent where it is provided that an action can only be brought for a sum to be fixed by arbitrators, or that no action shall be brought until there has been an arbitration, or that arbitration shall be a condition precedent to a right of action, but, where no such covenants are present, and there is simply a covenant to pay, and another covenant to arbitrate, they are distinct and collateral, and the covenant to arbitrate [the arbitration and award] is not in such case a condition precedent. The covenant to arbitrate in the present case being distinct and collateral, and the right of action not having been made dependent upon the result of arbitration, it is not a condition precedent, and the judgment of the Supreme Court based upon this ground cannot be sustained. * * *

[Reversed, and new trial granted.]

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(2) Strikes, Fires, and Breakage of Machinery as Express Conditions

"* * * It is further agreed that performance of this contract by the contractor is subject to strikes, fires, floods, and other similar and dissimilar causes beyond the control of the contractor."

NEW ENGLAND CONCRETE CONST. CO. v. SHEPARD & MORSE LUMBER CO.

Supreme Judicial Court of Massachusetts, 1915. 220 Mass. 207, 107 N. E. 917.

[Action by the New England Concrete Construction Company against the Shepard & Morse Lumber Company. Plaintiff excepts to certain rulings of the trial judge. Exceptions overruled.]

CROSBY, J. The contract upon which this action is brought arises from certain letters and an "order slip" delivered to the plaintiff by the defendant. By the terms of the contract the defendant agreed to manufacture and furnish the plaintiff 58,000 feet of No. 1 maple flooring, in accordance with certain specifications, for the sum of $37.-50 per thousand, delivered at Salem, Massachusetts. * * *

The contract contained a further provision that: "All contracts are contingent upon strikes, fires, breakage of machinery, perils of navigation and all other causes beyond our control." The evidence shows that on February 19, 1913 and before any of the flooring had been

manufactured or delivered to the plaintiff the defendant's mill at Burlington was destroyed by fire; that the defendant duly notified the plaintiff by letter of that fact and of its inability for that reason to carry out the contract.

The agreement is not an absolute contract by which the defendant agreed to furnish the flooring to the plaintiff, but was subject to certain conditions, including the condition that the contract was contingent upon fires; that is to say, the defendant was excused from performance in the event of the happening of any of the contingencies set forth in the contract. Davis v. Columbia Coal Mining Co., 170 Mass. 391, 49 N. E. 629.

The effect of this clause was not to extend the time of performance beyond the time limit, but wholly to relieve the plaintiff from the obligation to furnish the flooring called for by the contract. Metropolitan Coal Co. v. Billings, 202 Mass. 457, 89 N. E. 115. * * *

The case at bar is to be distinguished from such cases as Oakman v. Boyce, 100 Mass. 477, Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 N. E. 1020, and Metropolitan Coal Co. v. Billings, 202 Mass. 457, 89 N. E. 115, all of which cases involved the construction of strike clauses in contracts for the sale and delivery of coal, but where the contracts, properly construed, did not excuse performance absolutely, and where it was held that * * * companies were required to make reasonable efforts to fulfill the contracts notwithstanding strikes.

There was evidence to show that the defendant was a lessee of its mill in Burlington which its lessor was under no legal obligation to rebuild after the fire; that the defendant had no other mill where the flooring could have been manufactured, and that it could not have been furnished to the defendant, had the mill been rebuilt, until the latter part of June, 1913.

Whether the contract is to be construed as requiring the defendant to deliver the flooring about June 1st, or "as required probably shortly after June 1st," we are of opinion that upon all the evidence it could have been found that time was an essential part of the contract and was so contemplated by the parties; and the judge was warranted in finding that by reason of the destruction of the mill by fire it was impossible for the defendant to perform the contract according to its terms. Pickering v. Greenwood, 114 Mass. 479.

We perceive no error in the manner in which the presiding judge dealt with the requests for rulings, and are of opinion that the finding was warranted.

Exceptions overruled.

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(3) Written Order as Condition to Recovery for Extra Work

"* * * Any extra work to be performed by the contractor must be upon the written order of the engineer; and the written orders of the engineer to the contractor to perform any extra work are condi-

tions precedent to any recovery on the part of said contractor for any such work performed." (From standard form construction contract.)

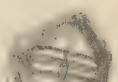
LEE v. BRAYTON.

Supreme Court of Rhode Island, 1893. 18 R. I. 232, 26 A. 256.

PER CURIAM. This is a petition for a mechanic's lien. The petitioner entered into a written contract, dated June 20, 1891, by which he agreed to do the mason work for the respondent, in building a house and barn, for $2,135, payable in installments at various stages of the work—the last $235, 62 days after the completion of the work. Accompanying the contract were plans and specifications particularly setting forth the work to be done and the material to be furnished by the contractor, and also providing for certain things to be done by the owner, or at her expense, in addition to the sum named as the contract price. These specifications provided that the contractor should excavate for the cellar the whole area to be covered by the house, to a required depth, and that the excavation should be a certain number of inches larger all around than the outside walls of the cellar. The specifications also provided that drains should be excavated outside of the cellar to a depth sufficient to take the drainage from the cellar, and also for the laying of two lines of agricultural tiles lengthwise of the cellar to connect with the drain under the cellar walls. The specifications also provided that all blasting of rock should be paid for by the owner. The buildings have been erected, and the respondent has been in the occupation of them, for a considerable period, but has never paid the last installment under the contract, though the time fixed for payment has long since passed, nor for the blasting, nor for building a catch-basin, and other work and materials charged in the account.

The respondent concedes that the petitioner is entitled to a lien for the $235, the last installment of the contract price, but contends that the blasting of rock, and the other items charged in the account for labor and materials, were extra work, and therefore, that the petitioner is not entitled to a lien therefor, because clause 13 of the contract provides that no claim shall be made for extra work unless the same shall have been done in fulfillment of a written order from the architect, and all such claims shall be made in writing to the architect, and, if allowed by him, shall be approved and indorsed on the contract after the next ensuing payment, and that no such indorsement appears on the contract.

We are of the opinion that the blasting of rock, being particularly mentioned in the specifications accompanying the contract, is to be regarded as work done under the contract, and not as extra work, within the meaning of clause 13. It was work provided for in the contract, and necessary for the completion of the house in accordance with it, since the drains mentioned in the specifications could not be excavated without the blasting and removal of the rock. It is true that the



amount to be paid for it was extra—outside of, or in addition to, the price to be paid for the other work—doubtless because it could not be known until the excavation had been made how much blasting was necessary, or how expensive it would be, and therefore no estimate of its cost could be made beforehand; but the fact that the cost of it was thus left indeterminate, and was to be paid in addition to the price for the other work, did not render it extra work, for, as we have said, the written contract provided, by necessary implication, that it should be done.

We find no mention of the catch-basin in the contract or specifications, nor is it delineated on the plans. We think, therefore, that it must be regarded as extra work, and that, as such, it is within the thirteenth clause of the contract, stated above, and that, being within that clause, the petitioner can claim no lien for it, unless there has been a compliance with the requirements of that clause, which does not appear. The same remarks are applicable to the other items in the account for work and materials furnished.

The two items, "loss of time for men, $20.26; delay, risk, and inconvenience to contract work, $118.37," are neither for work nor materials, and hence are not subjects of a mechanic's lien.

TRUSTEES OF ILLINOIS INSTITUTION FOR EDUCATION OF THE DEAF AND DUMB v. PLATT.

Appellate Court of Illinois, 1879. 5 Ill. App. 567.

McCulloch, J. This suit was brought by appellee against appellants to recover for extra work alleged to have been performed by him, in the building of the dining hall and hospital building, to be used in connection with the Institution for the Education of the Deaf and Dumb at Jacksonville. Appellee and one Thomas Carson had a contract with appellants for the erection of said building, by which they agreed that they would, in the best workmanlike manner, and according to the best mechanical art and skill, well and substantially erect, build, set up and deliver finished and completed ready to be occupied, the brick and stone work and plastering of the said building, according to the plans, specifications and detail drawings furnished by E. E. Myers, architect; the work and materials to be sufficient to fully complete the building so that there should be no extras or extra charges for the entire completion of said work, except where the same should be the result of changes in the plans, materials or labor, which appellants were at liberty to make at pleasure; the plans and specifications being signed and sealed by the parties and to be considered as part of the contract. By mutual agreement, Thomas Wadell was appointed superintendent of said building, to whose directions the contractors were to conform. In consideration of the performance of the work, appellants were to pay the contractors twenty thousand five hundred dollars, at certain stipulated periods, as the work progressed. It was further agreed that, if there

should be any alterations or changes in any of the work or the materials required during the construction of the building (which appellants were at liberty to make at pleasure), they must be stated in the contract in writing, stating the work to be done or omitted, and the amount of money required in such changes or alterations, whether the same should be in the nature of additions or deductions, and therein stating the work in particular and signed by the respective parties, and the price of such alterations should be the real and true value of the work and materials added or deducted.

The specifications which are made part of the contract, required all exterior brick work to be well and tastefully stained and tuck-pointed; that in every respect the work and materials should be performed in all its parts and places, and done in strict conformity to the orders and directions of the superintendent and provided that all interpretations as to the true meaning and intent thereof and the several plans should be given by the superintendent, and his decision should be final. * * *

It is next claimed by appellee that he furnished and laid up twenty-two thousand brick in the towers of the building, not embraced in the plans and specifications. This item might well be left to rest upon the same grounds as the last one. It appears from the evidence, however, that when the contract was signed the detailed drawings of the towers were not present, and so were not made a part of the contract. When these detailed drawings arrived, appellee claims they showed seven feet of brick wall to be laid above the cornices, not shown or in any manner indicated in the drawings signed by the parties. For this work and the bricks therefor he charges two hundred and forty-four dollars extra.

The exterior conformation of the building was plainly shown on the drawings embodied in the contract and should have apprised the contractors, as practical builders, of the usual requirements of such structures. Having commenced the work without detailed drawings or working plans of the tower, it was their duty, if on arrival these detailed drawings showed anything unusual, to have made their objections before doing the work, and to have had the decision of the superintendent upon the same. There is some slight evidence that one of them did call the attention of the superintendent to the fact, but not in such a way as to amount to an objection to doing the work under the contract, or a demand for a decision upon a disputed point. Appellants were never asked to insert this work as an extra into the contract, nor until after the work was done and about to be settled for under the contract, was any claim made for payment therefor.

The contract substantially provided that the contractors should furnish all labor and materials to finish and complete the brick work without any extra charge, and if changes should be made they should be specified in writing, and the amount of increase or decrease of cost specified. There can, therefore, be no claim sustained for extras except such as are specified in the writing, unless it can be shown that appellants had waived this provision.

This latter claim cannot therefore be allowed. * * *

Judgment reversed.

(4) Architect's Certificate as Express Condition Precedent

"* * * **Upon the completion of all the work included in this contract, the architect will certify to that effect. The said contractor further agrees that he shall not be entitled to demand or receive final payments for any portion of the aforesaid work or materials until all the stipulations and conditions hereinbefore mentioned are complied with and the said architect shall have given his certificate to that effect.**"

BUSH v. JONES.

Circuit Court of Appeals of the United States, Third Circuit, 1906. 144 F. 942, 6 L. R. A. (N. S.) 774.

ARCHBALD, District Judge. This was an action in the court below for $3,065, the final payment upon a contract for the construction of a building, together with a bill of some $40 extras. The verdict was in favor of the contractors for $2,500, a material reduction, particularly if interest be counted; the jury necessarily finding, however, under the instructions of the court, that the contract was substantially, if not completely, performed. The chief subject of controversy was the condition of the cellar, which admittedly leaked badly and that in the face of an apparent guaranty that it should not. The contractors also failed to produce at the trial a certificate of completion from the architect, as required by the contract. On both of these grounds it was contended that the plaintiffs were not entitled to recover, and these are the questions to be disposed of here.

According to the specifications upon which the contract for the building was let, it was provided with regard to the concrete work and waterproofing of the cellar: "The foundation shall be of broken stone (not slag) concrete made up as follows: 5 parts of broken stone, 2 parts Portland Cement, and 1 part of clean sharp screened gravel or bar sand; * * * all stone for concrete to be of approved quality. The outside of all foundation walls to be dashed with cement and sand, 1 part to 2 on the outside, and brought to a smooth surface, and the whole outside of the foundations, up to grade, to be coated with a thick coat of asphaltum pitch, put on with a 'mop.' * * * The layer of felt must occur on all other walls or piers, whether interior or exterior. The cellar wall shall be 10″ thick in all, the first 3″ to be of concrete, smoothly dressed for the reception of asphaltum; then one inch of asphaltum perfectly joined with the felt layers above mentioned; then 5″ of stone concrete; then one inch on top. The whole to be made perfectly water-tight and guaranteed."

It is claimed that the contractors by virtue of the last provision were bound at all hazards to make a water-tight job; that being, in terms, what they had not only undertaken but guarantied to do. But

to this we cannot accede. The guaranty was not absolute, but qualified. It extended to their own work only, and only so far as this was involved, to the result. The specifications, which were the work of the architect, and for which they could not be expected to assume responsibility directed how the work should be done, and by this they were controlled. So far as this was calculated to make a water-tight cellar, they unquestionably guarantied that it would be such. But that is all. It was not as though they were left to their own judgment; that which they were to do, as appears above, being specified in detail. No doubt, if there was any margin of discretion—as, for instance, with regard to the thickness of the mop coat of asphalt on the outside of the foundations; or in the manner of turning and joining the felt therewith "until perfectly water-tight," as it is said; or in grouting in "thoroughly" with asphalt the slot left for the purpose in the divided wall on the west line—it would come within their guaranty to see that these things were effectively done; and if the wall would be water-tight or otherwise, according as they were or were not, they would be correspondingly liable; but outside of this, not. The owner having assumed to say by the specifications what was to be done, the contractors were relieved so far as they complied therewith. They guarantied, not the sufficiency of this to produce the desired result, but merely the effectiveness of what they themselves did under it. McKnight Flintic Stone Co. v. Mayor, 160 N. Y. 72, 54 N. E. 661. * * *

The other point raised is more serious. It was provided in the contract that the work should be paid for "only upon the certificates of the architect," the final payment to be made within 30 days after its completion, and all payments to be due when certificates for them were issued. As already observed, the contractors produced at the trial no certificate of completion, the evidence being that it had been demanded and refused; reliance being placed, in its absence, upon the showing made that the contract had been substantially complied with. The defendants, in view of this, specifically requested the court to charge that there could be no recovery if there was a failure to secure from the architects a certificate that the work was completed. This was refused, and the question reserved. * * *

The law upon the subject of architects' certificates is well settled. It is perfectly legitimate to provide in a building or working contract that payment of the several installments of the contract price shall only be made upon certificates or estimates by the architect or engineer in charge as to the extent and value of the work done or materials furnished, and that final payment shall not be demandable without a certificate of completion. These are familiar provisions, universally recognized, and will be enforced. 30 Am. & Eng. Encycl. Law (2d Ed.) 1237. Equally well recognized, however, is it that the production of such a certificate as a condition precedent to a recovery is not necessary where it is capriciously or arbitrarily withheld. But where this is alleged it is incumbent on the contractor, in order to bring himself within the exception, if he does not produce a certificate, to show why he cannot, and until he successfully does so he has not made out a case. This is sus-

tained by the highest authorities, to some of which it may not be without profit to refer.

Thus in Martinsburg & Potomac R. R. v. March, 114 U. S. 549, 5 S. Ct. 1035, 29 L. Ed. 255, the final payment was not to be due until 30 days after a certificate from the engineer that the contract had been complied with, and in a suit by the contractor it was held that the declaration was demurrable, there being no certificate, nor any facts stated which entitled him to sue in the absence of one. This ruling is in line with previous decisions of the same court [citing cases]; and it must therefore be regarded as the settled law of the federal courts. So in Pittsburg Lumber Co. v. Sharp, 190 Pa. 256, 42 A. 685, which was also a suit on a building contract, in which it was provided that payments were to be made only on certificate of the architect, the plaintiff was not able to produce such certificate, and it was held that the burden was upon him, in default of it, to show by proper evidence that which would excuse or dispense with it. This he proceeded to do by evidence that he had done the work in all particulars as called for by the contract, and that he had made frequent requests of the architect for the final certificate, which he neglected and refused to give, and by collusion with the defendant wrongfully withheld; and, the question having been submitted to the jury with appropriate instructions, a recovery by the plaintiff was sustained. * * * In Michaelis v. Wolf, 136 Ill. 68, 26 N. E. 384, it is said by Baker, J.:

"Where in a building contract provision is made for the payment of the price or a portion or portions of such price upon the certificate or certificates of the architect in charge of the construction of the building, the obtaining or presentation of such certificate or certificates is a condition precedent to the right to require payment, and such condition must be strictly complied with, or else a good and sufficient excuse shown for not complying therewith."

And he adds that compliance or excuse for noncompliance must be averred in the pleadings and established by proof. Fowler v. Deakman, 84 Ill. 130, is an instructive case as to what is sufficient evidence to dispense with the production of a certificate. The work there was to be done to the satisfaction of the architect, who was to be the superintendent, and he was made the umpire or arbitrator to settle all disputes, his decision being conclusive and binding. It was recognized that, this being the agreement of the parties, they were governed by it, and that a certificate was necessary unless the architect acted in bad faith, refused to act, became incapacitated, or was prevented by some unforeseen accident or uncontrollable cause. But it was shown that, after having been frequently called upon to give a final certificate, and after striking out some of the items of extra work, the architect, after delaying for about a year, declined to do anything further to adjust the differences between the parties, and it was held that, upon proof of this, the contractor was absolved from any further effort to procure a certificate, and entitled to recover without it. So in Bradner v. Roffsell, 57 N. J. Law, 32, 29 A. 317, where the fraudulent withholding of a certificate by the architect was in issue, such fraud, as it is

held, may be proved by showing, as was there done, that the building had been completed in strict accordance with the contract. * * *

The conclusion to which this discussion leads is clear. Completion to the satisfaction and according to the trained professional judgment of the architect, who drew the plans and specifications, and is able to speak from a direct supervision over and inspection of the work as it progresses, and completion according to the opinion of the jury, under the imperfect conditions of a trial and the inability to produce things as they actually are, are two different and distinct propositions; and the owner, who has stipulated for the one, is not to be put off with the other, where everything is honestly and fairly done. Whether this is true, or whether the architect in withholding his approval acts capriciously or fraudulently, where there is evidence to sustain this charge, has necessarily to be submitted to the jury, and proof of a substantial compliance with the contract enters into this as an essential step. But to hold that, upon such proof, without more, the necessity for the production of a certificate is dispensed with, or is to be regarded as unreasonably withheld, and that, not as a fact, with others, for the consideration of the jury, but as a matter of law for the court, not only loses sight of the distinction which we have referred to, but makes the provision with regard to the architect's certificate useless and meaningless, for it puts a contract where it appears on a level with one where it does not; the contractor in the former being permitted to recover upon showing that he has substantially complied with it, and in the latter being required to prove no less.

The jury in the present instance should therefore have been instructed that the production of a certificate was essential to a recovery, and that the want of it could not be dispensed with, unless it was established to their satisfaction that it had been unreasonably withheld. Bearing upon this, as already stated, was the evidence of a substantial completion of the work; but it should not have stopped there. Compliance with the contract was seriously questioned, and the material reduction made by the jury from the amount of the plaintiffs' claim shows that at least some things were lacking. Admittedly, there was a leaky and imperfectly waterproofed cellar, and whatever may be said of the guaranty that it should be water-tight, there was in this an apparent defect, sufficient to justify the architect in refusing to approve until it had been remedied. Had the jury, therefore, been instructed as to the necessity for his approval, and what was requisite to overcome the want of it, they might well have hesitated, under the circumstances, to hold as they were required, in order to find for the plaintiffs, that his refusal was arbitrary. In any view, the question was for them, and, not having been submitted to them nor passed upon by them, the verdict is without a proper finding to support it, and cannot be sustained. * * *

[Judgment reversed, and new trial ordered.]

BADGER v. KERBER.

Supreme Court of Illinois, 1871. 61 Ill. 328.

This suit was brought to recover the contract price for the cut stone used in building defendant's * * * house. The stone was white and clear when used, but, by exposure to the weather, small particles of iron which it contained oxidized and colored the stone, and defendant refused to pay the last installment on the contract [and pleads the prior breach by plaintiff of failure to secure the certificate of the superintendent of construction, by the contract made an express condition precedent to defendant's duty thereon].

Mr. Justice THORNTON. * * * The contract provided that the material used and the work done should be paid for upon the certificate of the superintendent, who was selected by the parties and was named in the written agreement. Stone was to be furnished and the work completed to the satisfaction of the superintendent.

The kind of stone contracted for was used, and there is no complaint of the character of the work. There was some discoloration of the stone after it was placed in the building, and for this reason only the superintendent refused to give a certificate for the amount sued for.

There is evidence in the record that the contractor bid with reference to the identical stone used, and that it was recommended by the superintendent. He had a sample of it in his office at the time of the contract, and had also given certificates for more than half of the contract price, as the work progressed. * * *

The provision in the contract in regard to the stone is as follows: "The contractor must furnish a first rate quality of stone, in every particular sound, and of uniform color for the light colored Cleveland sand stone, or the Columbia stone." The Columbia stone was used. Its soundness and quality are not questioned. The contractor based his bid upon its use, and the superintendent not only recommended it, but had used it in another building during the previous year.

The refusal to give the certificate, under the circumstances, was bad faith in the superintendent. The contractor had fully complied, and was entitled to the value of his materials and labor, according to the price agreed upon.

The modifications of appellant's instructions were proper. They substantially informed the jury that the superintendent must act in good faith in his relations to the parties, and that if he refused to deliver a certificate, in bad faith and fraudulently, then the contractor must recover upon performance.

Performance by him, as well as the fraudulent conduct of the superintendent, were fairly submitted to the jury, accompanied with proper instructions. They have determined these matters from the evidence, and we shall not disturb the finding.

The superintendent should have exercised his power with reasonable discretion, and not capriciously. If he acted fraudulently, and

ought to have been satisfied with the work and material, and so the jury have found, and rightly, then the judgment should not be reversed. Baker v. Jones, 2 Car. & Kir. 742; Mills v. Weeks, 21 Ill. 561; McAuley v. Carter, 22 Ill. 53.

The judgment is affirmed.

Judgment affirmed.

MacKNIGHT FLINTIC STONE CO. v. MAYOR, ALDERMEN AND COMMONALTY OF CITY OF NEW YORK.

Court of Appeals of New York, 1899. 160 N. Y. 72, 54 N. E. 661.

[Action by the MacKnight Flintic Stone Company against the Mayor, Aldermen and Commonalty of the city of New York to recover on a contract. From a judgment of the Appellate Division of the Supreme Court, affirming a judgment dismissing the complaint upon the merits (31 App. Div. 232, 52 N. Y. S. 747), plaintiff appeals. Plaintiff entered into a contract with the city of New York to erect a courthouse and prison according to certain plans and specifications furnished by it. The plans were designed for the accomplishment of certain results in the exclusion of water from the cellar to be floored and walled by plaintiff, which were below tide level. The contract provided for the quantity and quality of material to be used; that it should be installed under the direction and supervision of the city engineers; that the engineers might alter the specifications in a manner not materially affecting their substance in order more fully to carry out the work contemplated; "that the work was to be turned over to the city by the contractor in perfect order, and guaranteed absolutely water and damp proof for five years from the date of acceptance of the work, any dampness or water breakage within that time to be made good by contractor." Plaintiff used the material called for in the specification, both as to quantity and quality, under the direction of the city engineers and the latter made no objection either to material or method of construction, and the contractor complied with the contract and specifications in every particular.]

VANN, J. The main question presented for decision is whether the plaintiff can recover without making the floor of the boiler room absolutely waterproof, even if it has conformed in every respect to the plan and specifications. The plaintiff insists that it has fully performed the contract, because it has furnished all the materials of the quality required, and has done all the work called for by the plan and specifications, while the defendant insists that performance is not complete, because the plaintiff warranted that the plan and specifications, when carried into effect, would result in a waterproof boiler room, and that the boiler room is not waterproof.

While the evidence would not compel, it would support a finding that the contract has been fully performed, unless the plaintiff guaranteed the sufficiency of the plan and specifications to produce absolute waterproof construction. The form of its promise was to fur-

nish "the materials and labor for the purpose, and make water-tight the boiler room etc. * * * in the manner and under the conditions * * * set forth in the annexed specifications," and that it would turn the work over to the city "in perfect order, and guaranteed absolutely water and damp proof for five years from the date of the acceptance of the work"; any dampness or water breakage within that time to be made good by the contractor without expense to the city. If this means that the plaintiff agreed to make the boiler room water tight by following the plan and specifications, even if it could not be done in that way, it agreed to perform an impossibility, as the jury might have found. If, on the other hand, the meaning is that it agreed to make the boiler room water-tight by following the plan and specifications, provided it could be done in that way, it has performed its contract, as we must assume for the purpose of this appeal.

The rule of reasonable construction governs courts in the enforcement of contracts. The contract now before us does not necessarily require the construction that the plaintiff guaranteed the sufficiency of the plan and specifications to produce the result desired, because it does not in terms so provide. There is no independent or absolute covenant to that effect. There is nothing in the subject of the contract, the situation of the parties, or the language used by them, to conclusively indicate such an intention, and a fair and reasonable construction avoids such a peculiar and unjust result. The agreement is not simply to do a particular thing, but to do it in a particular way, and to use specified materials in accordance with the defendant's design, which is the sole guide. The promise is not to make water-tight, but to make water-tight by following the plan and specifications prepared by the defendant, from which the plaintiff had no right to depart, even if the departure would have produced a water-proof cellar. * * *

[As to the five-year guaranty clause wherein] the plaintiff agreed to turn the work over "in perfect order and guaranteed absolutely water and damp proof for five years," and to make good any dampness or water breakage during that period, this as we think applies to the material and workmanship, but not to the plan. It has reference to what the plaintiff was to do, not to what the plan would accomplish, and is predicated on the efficiency of the plan. The plaintiff was to execute the work according to the plan, and to turn it over in perfect order, but, to guard against latent defects, he was required to protect the defendant against them for the period named. * * *

We think the evidence presented a question of fact for the jury as to the sufficiency of the plan to produce the result desired, and as to performance of the contract when properly construed. If the work was faithfully performed according to the plan and specifications, and the failure to secure a water-tight boiler room was wholly owing to the defective design of the defendant, the plaintiff would be entitled to recover, notwithstanding the refusal of the superintendent to

give the required certificate, for under those circumstances it would be his duty to give it, and a refusal to do so would be unreasonable. Bowery Nat. Bk. v. Mayor, etc., of City of New York, 63 N. Y. 336; Nolan v. Whitney, 88 N. Y. 648; Thomas v. Stewart, 132 N. Y. 580, 30 N. E. 577.

The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except GRAY, J., dissenting. Judgment reversed, etc.

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(5) Time as an Express Condition Precedent

"* * * It is further agreed that time shall be of the essence of this contract."

ADAMS et al. v. GUYANDOTTE VALLEY RY. CO. et al.

Supreme Court of Appeals of West Virginia, 1908. 64 W. Va. 181, 61 S. E. 341.

Bill to cancel a contract by P. C. Adams and others against the Guyandotte Valley Railway Company and another. Decree for defendants, and complainants appeal.

POFFENBARGER, P. * * * The [plaintiff] landowners agreed to * * * lease * * * for coal-mining or coal-coking purposes any part of the land that lies upon or is drained by the stream emptying into the Guyandotte river to any party or parties presented by the railway company or its assigns, with all such privileges as are necessary and proper for the conduct of mining operations. * * * The covenants and conditions imposed upon the railway company were two in number, only the first of which is important, which reads as follows: "It will cause the said railway to be commenced within one year and completed and in operation opposite the said lands of the parties of the first part by the 1st of January, 1903; and it is understood that, if the said railway is not completed and in operation by the said date, this agreement shall no longer be binding upon the parties hereto." * * *

Failure of the railway company to comply with the condition having been shown, the propriety of the remedy invoked by the plaintiff is dependent upon the character of that condition. * * * If it is a condition precedent, one which it was incumbent upon the railway company to perform before any interest, right, title or estate vested or could vest, * * * equity has jurisdiction to cancel the contract by way of removing a cloud from the title to the land, if it constitutes a cloud thereon. * * * That failure to perform a condition precedent prevents the vesting of title or right is elementary law. * * *

No authority need be cited for the proposition that the completion and operation of the railroad opposite the land is a condition pre-

cedent. * * * That was the substance of the thing which it was stipulated the railway company should do. It constituted the whole consideration. * * * The only matter about which there could be a doubt is whether time is made an essential part of the condition. In the construction of contracts this is often a perplexing inquiry, but the doubt generally arises in those instances in which the parties have not, by any express term of the contract, indicated the essentiality of the time specified. Then resort must be had to the nature of the [contract], its subject-matter, the evident purpose had in view, the prior and subsequent conduct of the parties, and the immediate context of the phrase or clause specifying time. The form and legal effect of the stipulation also have important bearing upon the question. In such cases, the inquiry is for the intention of the parties, and it must be gathered from the whole instrument and the surrounding circumstances. * * *

Under the practically unlimited right and power of parties to make such contracts as they see fit to make, and bind themselves to such extent and in such manner as they please, they may make performance of any covenant or condition, however unimportant or trivial in character, a condition precedent. Though time of performance may be comparatively or really unimportant in a practical sense, they have the power to stipulate with one another that failure to observe it shall be fatal and put an end to the contract. * * *

[In the present case the parties] have solemnly said in their written agreement, not only that the road should be completed and operated opposite the land, but also that it should be completed and operated by the 1st day of January, 1903, and that failure to comply within that time should put an end to the contract. In this final clause the date of completion is referred to as well as the requirement of completion. * * * Our conclusion is that, by the express terms of the contract, time is made of the essence thereof. As the road was not built within that time, no title vested, nor can it ever vest under this contract. Wherefore the agreement now amounts to nothing more than a cloud upon the title of the plaintiffs, and the court should have canceled it as such. * * *

(B) Implied Conditions Precedent

We have seen, in the preceding section, that, where the parties have specifically stated that the performance of some term of the agreement is one of the important things bargained for, the *essence* of the contract, the strict performance of that term is an *express* condition precedent to further liability thereunder. But, even where the parties have not so stated their intention, the court may nevertheless find implied in the agreement and the surrounding circumstances the clear intention that the performance of some term is the particular thing contracted

for. The breach of such a term is the breach of an *implied* condition precedent.

Breaches of contract are of four classes:

(1) The material breach of a material term. This amounts to the breach of a condition precedent. Note that not only must the term be material, but also the breach must be serious, in order that a discharge of the contract may be effected. The court must be able to say that the aggrieved party has not secured what he bargained for.

(2) The immaterial breach of a material term. If the breach be slight or unimportant, the performance will be substantially if not literally what was bargained for; and a substantial performance in good faith by one party justifies performance on the part of the other, giving him no more than a right to damages for the breach.

(3) The material breach of an immaterial term. Here also the breach still leaves substantial performance. If the term broken was not the "essence" of the contract, if it was not the condition upon which the other party's obligation depended, then the breach of such a term ought only to give him a right to damages, and not the additional right to renounce his obligation under the contract.

(4) The immaterial breach of an immaterial term. Here is the next thing to strict performance. Very clearly such a breach would leave so substantial a performance that the damages would be nominal.

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(1) Time as an Implied Condition

CLARK ON CONTRACTS (3d Ed.) p. 514: "Where time is not made of the essence of the contract by express stipulation, it may nevertheless be held to have been intended from the nature of the contract. In mercantile contracts, such as contracts for the manufacture and sale of goods, it is generally held that time is of the essence; and, where a term of the contract provides for the time of shipment or delivery, shipment or delivery at the time fixed will usually be regarded as a condition precedent, on the failure of which the other party may repudiate the whole contract. In contracts for the sale of land, or for the performance of services, or the construction of buildings and the like, time will be held of the essence if, from the nature of the property and the circumstances, it seems that the parties must have so intended, but generally, in such contracts, time is not of the essence."

BECK & PAULI LITHOGRAPHING CO. v. COLORADO MILLING & ELEVATOR CO.

Circuit Court of Appeals of the United States, Eighth Circuit, 1892. 52 F. 700, 3 C. C. A. 248.[1]

SANBORN, Circuit Judge. The ground on which it is sought to sustain the instruction of the court below to return a verdict for the defendant in this case is that the plaintiff failed to tender or deliver the articles contracted for to the defendant, at Denver, until six or eight days after the expiration of the year, that the plaintiff did not therefore furnish them "in the course of the year," and that this failure justified the defendant in repudiating the contract, and refusing to pay any part of the contract price.

It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, * * * the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust penalties may not be inflicted, nor unreasonable damages recovered. Thus, in the ordinary contract of merchants for the sale and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. * * *

This application of the general principle commends itself as just and reasonable, on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods. On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit $1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation when the house was completed shortly after

[1] Statement of facts is omitted.

the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. * * * This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one. The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. * * * But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. * * *

The contracts in the case we are considering were not for the blank paper on which they were finally impressed; that was of small value in proportion to the value of the finished articles; they were not for the sale of anything then in existence; they were for the artistic skill and labor of the employés of the defendant in preparing the sketches and designs, transferring them upon stone, and finally impressing them upon the paper the defendant was to furnish; and they authorized the plaintiff, without other orders than the contracts themselves, and the approvals of the designs and proofs there called for, to prepare and furnish all the articles named in the contracts and to collect the contract price therefor. These contracts required the names of defendant's mills and its trade-marks to be so impressed upon all these articles that when they were completed they were not only unsalable to all others, but worthless to plaintiff for all purposes but waste paper. The contracts are evidence that on December 31, 1889, the articles contracted for would have been worth about $6,000 to the defendant, and if a few days later, when they were tendered, they were not worth so much, the defendant may recover the damages it suffered from the delay from December 31, 1889, to the date of the tender, in a proper action therefor, or may have the same allowed in this action under proper pleadings and proofs, and no injustice will result; while, if the defendant was permitted on account of this delay to utterly repudiate the contract, the plaintiff must practically lose the entire $6,000.

The contracts contain no stipulation from which it can be fairly inferred that the parties intended the time of performance to be even material; indeed, they strongly indicate the contrary. They provide that a certain portion of the articles shall be furnished in two months, that the remainder of the stationery and 5,000 hangers shall be furnished in the course of the year, and that 5,000 hangers more and the vignette shall be furnished within a reasonable time after the proofs are approved by the defendant; there is no stipulation for the payment of any damages or the avoidance of the contracts on account of a failure to perform within any of the times stipulated in the contracts, and the parties themselves proceeded so leisurely thereunder that the first and only admitted request by the defendant for the delivery of any of the articles not delivered in August was on December 16, 1889. * * * In the absence of any such stipulation, or any clearly-expressed intent that time should be material even, it would be clearly unjustified by the law and inequitable to hold that the plaintiff is compelled to forfeit his entire contract price on account of this trifling delay that may have been immaterial to the defendant, and, if not, may be fully compensated in damages.

The result is that these contracts were not for the sale and delivery, or the manufacture and delivery, of marketable commodities. They were contracts for artistic skill and labor, and the materials on which they were to be bestowed in the manufacture of articles which were not salable to any one but the defendant when completed because impressed with special features useful only to it. There was nothing in the contracts or their subject-matter indicating any intention of the parties that the stipulations as to time should be deemed of their essence; and the defendant was not justified on account of the slight delay disclosed by the record in refusing to accept the goods, or in repudiating the entire contract. This conclusion disposes of the case, and it is unnecessary to notice other errors assigned.

The judgment below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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(2) Installment Contracts

NORRINGTON v. WRIGHT.

Supreme Court of the United States, 1885. 115 U. S. 188, 6 S. Ct. 12, 29 L. Ed. 366.[2]

GRAY, J. * * * In the contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident,

[2] Statement of facts is omitted.

such as the time or place of shipment, is ordinarily to be regarded as a * * * condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. * * *

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. * * *

The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. * * * The contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure, or weight." Brawley v. United States, 96 U. S. 168, 171, 172, 24 L. Ed. 622.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that

cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties. * * *

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action. * * *[3]

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(3) Engineer's Decision as a Condition

"* * * It is further agreed that in all cases of dispute arising out of this contract regarding the value of extras, the meaning of plans and specifications, allowances of the amount of damages growing out of violations of any of the provisions of this contract, the decision of the Engineer shall be final and binding on both parties hereto."

KELLY v. PUBLIC SCHOOLS OF CITY OF MUSKEGON.

Supreme Court of Michigan, 1896. 110 Mich. 529, 68 N. W. 282.

Suit by William D. Kelly against the public schools of the city of Muskegon on a contract for the erection of a high school building. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

MOORE, J. The plaintiff is the assignee of Joseph D. Boland, and as such brought suit. Mr. Boland was the contractor for the erection of a high-school building in the city of Muskegon, under a written contract, dated July 6, 1892, which required him to perform all the work and provide all the materials for the erection and completion of the school building; the whole of said work to be performed, and all the materials to be furnished, in conformity with the plans and specifications of the same, as made by Patton & Fisher, of Chicago, Ill., the architects appointed by said party of the second part. The contract provided that, on the fifteenth and last days of each month, payment shall

[3] Having determined that, due to the nature of the contract, the term as to quantity was material as a clear implication of the intention of the parties, the court in the above case proceeded to a consideration of the materiality of the breach, and, having decided that the failure of performance constituted a material breach, came to the conclusion that its effect was to release the aggrieved party from further duty under the contract.

The presumption, in contracts for the sale of marketable commodities, that the intention of the parties is that the terms as to time, quantity, etc., are material, applies in installment contracts to each installment, and a material breach of such term as to any one shipment will excuse further performance on the part of the aggrieved party.

be made on the estimate of the architects, or person appointed by them for that purpose. * * * When the plans and specifications were originally made, they provided for but three chimney stacks that should go through the roof, and two chimney ventilating stacks, running from the basement, and stopping at the third floor. Before the contract was let, the plans and specifications were returned to the architects, with instructions to change them so as to provide for the extension of two ventilating chimney stacks through the roof. The architects undertook to make these changes, and did make them in some of the plans and in some of the specifications, but failed to make detailed changes in all the specifications. These plans and specifications were returned to the board about April 13th, and were consulted by Mr. Boland before he made his bid, which was made May 2, 1892. The contract was let to him May 3d. It was drawn later and signed July 6th.

When Mr. Boland, in his work of erecting the building, reached the third or assembly floor, he stopped work on the two chimney ventilating stacks, which he had erected from the basement to that place, because, as he read his contract, it did not call for the erecting of those stacks higher than that point. When the superintendent ascertained that Mr. Boland was not intending to erect the stacks higher than the third floor, he called the attention of the chairman of the building committee to it, and explained to him what Mr. Boland claimed with reference to the stacks. The chairman then examined the specifications and plans with the superintendent, and his attention was particularly called by the superintendent to the specifications, which called only for three chimneys to go above the roof, the other two to stop at the floor of the assembly room. The chairman said to the superintendent that these two chimneys must be built up, and, if there was any question as to the responsibility of the school board in the matter, he would report it at the next meeting of the board. The superintendent insisted that the chairman should go to the building and examine into the matter himself. He did so, and decided that it would not be practicable, with the experience they had had, to leave the flues in that shape. A school building in the city had formerly burned from that cause, and he insisted that such a thing should not happen again, and decided to carry the flues to the roof, and stated to Mr. Boland and the superintendent that the matter in controversy must be settled by the full board. The chairman testified that at that conversation at the high school building, just referred to, he stated and understood that the intention of the plans and specifications was to stop these stacks at the third floor, but that he protested against it, and would not have it that way, and ordered them built up.

Accordingly, Mr. Boland went on with the work, and, in due course of time, finished the building and topped out these two chimney stacks. The matter was submitted to the architects whether he should receive extra compensation for that work, and they decided that he should not. The defendant corporation declined to pay for the labor and materials expended in the topping out of these two stacks; claiming that the contract made the architects the arbiters in the matter, and

their decision protected the defendant. Mr. Boland assigned his claim to the plaintiff, who, after the building was completed and accepted, brought suit; and on the trial of the case, before a jury, the circuit judge directed a verdict for the defendant, on the ground that the decision of the architects was binding upon both parties and final.

There are a good many assignments of error made by the plaintiff, but, in our view of the case, it is not necessary to discuss many of them, as the issues involved are questions of law, and grow out of the construction of the contract. After a careful consideration of this contract, we can reach no other conclusion than that it falls within the case of Guthat v. Gow, 95 Mich. 527, 55 N. W. 442, and should be governed by it. The plans and specifications were accessible to, and examined by, Mr. Boland, before he made his contract. An examination of them would show there were apparent discrepancies in them. With that condition of things existing, Mr. Boland signed a contract containing the following provision: "That if any apparent discrepancy shall be found to exist between the plans, working drawings, and specifications, the decision as to the fair construction, and of the true intent and meaning, of the plans, working drawings, and specifications, shall be made by the said architects, whose decision shall be binding, in that regard, upon the parties hereto." This seems like a reasonable provision, and we think both parties are bound by it. The circuit judge was requested to charge the jury, in effect, that, if the architects were guilty of fraud in making their decision, it would not be binding upon Mr. Boland or his assignee. The circuit judge refused to give this charge, and counsel for plaintiff make a learned and exhaustive brief upon the error they have assigned to the refusal of the court to charge as requested, calling our attention to many decisions. The trouble with their argument is, there is no testimony to base it upon. Unless the fact that the architects who drew the plans and specifications were to receive as their compensation 5 per cent. of the total cost of the building, will warrant an inference of fraud in their decision, there is nothing in the record to indicate but what their decision was made in the utmost good faith. We are not prepared to draw any such conclusion.

Judgment is affirmed. The other justices concurred.

JONES et al. v. CITY OF NEW YORK et al.

Supreme Court, Trial Term, New York County, 1900. 32 Misc. Rep. 211, 65 N. Y. S. 747.

McAdam, J. The plaintiffs entered into a contract with the board of education, December 28, 1898, by which they agreed to build a school house at the southeast corner of Hubert and Collister streets for $193,931. The work was to be commenced on a day to be designated by the superintendent of school buildings, and completed within 300 days thereafter. Sundays or holidays were excluded from the time allowed for completion. On January 26, 1899, the superintend-

ent of school buildings sent a letter to the plaintiffs, notifying them that the school board had just received notice that the contract had been approved by the comptroller on January 24, 1899, and that there need be no delay in the progress of the work. Although no specific day was designated when the work was to commence, the notice was sufficient to warn the contractors of the consequences of delay. As a matter of fact, the plaintiffs had commenced their work before the time they received the notice, which was January 28, 1899. To give them a more specific notice to commence would, under the circumstances, have been idle ceremony. The case in these respects differs from Dwyer v. City of New York (34 App. Div. 450, 55 N. Y. S. 930), and is not controlled by it. Clause 4a of the contract provides:

"That the parties of the second part [plaintiffs] will, upon the execution hereof, forthwith proceed with the said work, and every part and detail thereof, in a prompt and diligent manner, in order to complete and finish the same, and every part and appurtenance thereof, in a durable, workmanlike, and substantial manner, within the time above limited for that purpose, and without the performance of any part of the said work in weather deemed unsuitable therefor by the superintendent of school buildings, whose determination thereon shall be final and conclusive."

The meaning of this is that weather conditions were not to be considered as in any wise extending the 300 days allowed by the contract, unless the superintendent of school buildings deemed such weather unsuitable therefor. Bearing in mind these provisions, there will be found in the seventh paragraph of the answer the two main conditions of the contract upon which the determination of the action depends. They are as follows:

"Fourth. (b) That in case the parties of the second part [plaintiffs] shall at any time refuse or neglect to supply a sufficiency of workmen and materials of the proper skill and quality, or shall fail in any respect to prosecute the work required by this contract with promptness and diligence, or shall omit to fulfill any provision herein contained, this contract, after three days' notice, in writing, * * * shall be, and shall be held to be, voided and forfeited. * * *

"Twelfth. (b) To prevent all disputes and litigations, it is further agreed by and between the parties to this contract that the superintendent of school buildings shall in all cases determine the true construction of the plans and drawings or specifications hereinbefore mentioned, or any part thereof, and he shall in all cases decide every question which may arise relative to the execution of this contract, or the work and materials to be done and provided hereunder, on the part of the parties of the second part, and his decision shall be final and conclusive upon the said parties of the second part."

On May 29, 1899, the superintendent of school buildings called the attention of the school board to the fact that, although nearly five months of the time had expired, the plaintiffs' work had not progressed above the level of the cellar floors. The board thereupon adopted a resolution directing that a notice be served on the contractors that if,

at the expiration of three days, they had not a sufficient number of workmen and proper material on the ground to prosecute their work according to the contract, the superintendent be directed to take possession of the work. The notice was served upon the plaintiffs, but was not complied with. After consultation with the corporation counsel, the school board concluded to give the contractors another opportunity of proceeding with the building with proper diligence, having reference to the portion of the 300 days yet unexpired. The contractors still being in default after this indulgence, the school board took possession of the work and entered into a new contract, in the manner required by law, with one James J. Looney, for $225,459; exceeding by $31,528 the contract price with the plaintiffs.

Without rehearsing the evidence given upon the different propositions, the court finds: (1) That the plaintiffs did not proceed with the work in a prompt and diligent manner; that they failed to supply a sufficiency of workmen and materials, and wholly neglected to do their work or perform their contract so that the same might be completed within the stipulated 300 days; and that such delays were substantial and not trivial. (2) That the board of education, for these reasons, and according to the terms of the contract, resumed possession of the work, and awarded a new contract therefor to James J. Looney for $225,459; being the lowest price at which said board could obtain performance of said work. (3) That no payments became due to the plaintiffs under their contract. (4) That the superintendent of school buildings, acting upon information and evidence, determined said questions of neglect and nonperformance adversely to the plaintiffs, and such determination was reasonable and proper under the contract.

As matter of law, the court decides:

1. That the decision of the superintendent, he having been selected by both parties as the final arbiter, is conclusive, there being no evidence of fraud or misconduct on his part. * * * The case of Connecticut Val. Granite & Mining Co. v. Trustees of New York and Brooklyn Bridge, 32 App. Div. 83, 52 N. Y. S. 667, cited by the plaintiffs, rests upon its own peculiarities, and does not militate against the rule stated. The superintendent, in this instance, acted on evidence upon which he based his judgment. In that case the conclusion was reached arbitrarily, and without any information warranting the conclusion of the engineer, whose judgment was pleaded in bar, and the jury so found. Here the reverse is the fact. There was also a question of waiver in that case, that does not appear in this controversy.

2. That the defendants are not only entitled to judgment dismissing the complaint upon the merits, but to recover from the plaintiffs by way of counterclaim, the sum of $31,528; being the damage occasioned to the defendants by such nonperformance aforesaid, and the natural, direct, and immediate result of the breach.

ST. PAUL & N. P. RY. CO. v. BRADBURY et al.

Supreme Court of Minnesota, 1889. 42 Minn. 222, 44 N. W. 1.[4]

MITCHELL, J. 1. It seems to us, to use the language of the court below, that defendants' case "has nothing to rest on." The "notice to proposers" for the construction of plaintiff's shops contained plans and specifications of the building; also estimates by plaintiff's engineers of the amount of material required to construct them according to the plans. But this notice (made a part of the contract) further states that "the quantities and amounts given in these forms of proposals must be verified by the proposer, as the company will not be responsible for any error resulting from their use. They can be verified by aid of the plans." Patterson, defendants' principal, without verifying these estimates for himself, put in his bid and made a contract to construct the buildings for a certain sum. The offer of defendants on the trial was, in substance, to show that Patterson supposed the estimates were correct, but that in fact they were too small, and that it required much more material to construct the buildings according to the plans.

The relief asked is that the contract be reformed, and that Patterson be allowed, in addition to the contract price, the value of the material actually used in excess of the engineer's estimates. To reform the contract in this way would be, not merely to make a contract for the parties which they never agreed to, but to make one which defendant expressly declared it would not make. Patterson was expressly notified not to rely on the estimates, but to verify them for himself, which he had the means of doing; also that the company would not be responsible for any error resulting from their use. He not only put in his bid on this condition, but expressly assented to it in his contract. He took his chances, and must stand the consequences. The fact that it took more material to construct the buildings than estimated by the company's engineers does not entitle him to any allowance beyond the contract price. Cannon v. Wildman, 28 Conn. 491.

2. Both parties have discussed the second assignment of error as if the offer referred to was of evidence that Patterson had furnished material for extra work not specified in the plans. We find nothing in the record to indicate that such was the offer, but we will treat it as the parties both seem to have understood it. The contract expressly gave the company the right to extend the contract so as to cover any additional work of the same nature that might be ordered by its chief engineer; also the right to make any such alterations or omissions of any of the work specified in the drawings as the chief engineer might consider desirable or necessary. It was solely with reference to this right that it was elsewhere stated in the contract that the plans, maps, and profiles of the work prepared by the engineers and the quantities estimated therefrom, were approximate merely, and were subject to change and alteration. It was further provided that, in case of any change in

[4] Statement of facts is omitted.

the present plans which necessitated alterations, additions, or omissions, the detailed proposals were to be used as a basis for a determination of the increase or decrease of the contract price of the work. All claims for extra work or material were to be presented to the chief engineer for allowance. It was also mutually covenanted and agreed by the parties that, to prevent disputes and misunderstandings between them in relation to any of the provisions of the contract, or of the true intent and meaning thereof, or the matter of performance thereof, and for a speedy settlement of such as might arise, the chief engineer of the plaintiff "shall be, and he is hereby made and constituted, the sole umpire to decide all such questions and matters. He shall also decide the amount and quantity, character and kind, of work and materials performed and furnished by the party of the first part under this contract, including all work and material; and his decision shall be final, and shall be binding and conclusive, to all intents and purposes, and in all places, and on the said parties hereto."

Provisions of this kind, especially in building and railroad construction contracts, are very common, and the binding force of a stipulation leaving the estimate of the quantity and quality of the work absolutely to the determination of the architect or engineer or some other person, and making his decision final, is too well settled to admit of argument. In such a case his decision, in the absence of fraud or such gross mistake as would imply bad faith or a failure to exercise an honest judgment, is conclusive. Kihlberg v. U. S., 97 U. S. 398; Lauman v. Young, 31 Pa. 306; Lull v. Korf, 84 Ill. 225; Herrick v. Railroad Co., 27 Vt. 673; Hudson v. McCartney, 33 Wis. 331; Finegan v. L'Engle, 8 Fla. 422; Kidwell v. Railroad Co., 11 Grat. 690; Whiteman v. Mayor, etc., 21 Hun, 117. The contract also provided that when the chief engineer was of opinion that Patterson had completed the work according to the contract he should so certify in writing, with a final estimate of the work done, and a statement of the amount due and unpaid thereon, and that, within 30 days after such final estimate, the company was to pay Patterson all moneys so found due him.

In the absence of all the evidence in the case, we must assume that it proved, as found by the court, and as stated by counsel on the trial as a ground for rejecting defendants' offer, that Patterson presented his claims for extra material; that the same were fully passed upon by the chief engineer, and each item either allowed and included in the final estimate or disallowed by him; and that this final estimate, so made and determined by the engineer, showed the amount and value of the work done by Patterson as stated in the complaint. Under this state of facts the defendant, without claiming or offering to prove any fraud or partiality on part of the engineer, or anything to indicate a failure on his part to exercise an honest judgment in the matter, proposed to go behind his estimate and decision, and show that he had not allowed Patterson enough. This could not be done. The decision of a court or jury cannot thus be substituted for that of the arbiter or umpire agreed on by the parties. * * *

(4) Satisfaction as a Condition

BROWN v. FOSTER.

Supreme Judicial Court of Massachusetts, 1873. 113 Mass. 136, 18 Am. Rep. 463.

[Action on a contract to recover the price of a suit of clothes. By the agreed state of facts it appeared that by the contract the plaintiff was to make a suit of clothes for the defendant on or before a specified day; that the suit was to be made to the satisfaction of the defendant; that the suit was delivered at the time specified, and defendant refused to accept it, stating that he was not satisfied.]

The defendant offered evidence that the clothes did not fit him, and that they were not made in the manner and form agreed upon. While the defendant was testifying, the plaintiff produced the clothes in court, and requested the defendant to try them on in the presence of the jury. The defendant assented, and, having put them on, wore them in the presence of the court and jury. The plaintiff then called several tailors as experts, who testified that the clothes needed some alterations before they could be called a good fit, but that such alterations could be easily made without injury to them. He also offered evidence that he wrote a letter to the defendant the same day the clothes were returned, in which the following language was used: "Can't you come and let us see what the trouble with the fit of your clothes is? From what you say about the coat we think we could remedy that, and we could make another vest if necessary, and coat, too." To this letter the defendant replied that the clothes were unsatisfactory to him as they were, and that he would not accept them after they had been worked over and botched up, and refused to allow the plaintiff to make a new suit, or to accept any alterations to the suit already made. * * *

The jury returned a verdict for the plaintiff, and the defendant excepted.

DEVENS, J. There was evidence at the trial to show that the contract between the parties was an express contract, and by the terms of it the plaintiff agreed to make and deliver to the defendant upon a day certain a suit of clothes, which were to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept and promptly returned the same. If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compen-

sation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered. * * *

Exceptions sustained.

MIDGLEY et al. v. CAMPBELL BLDG. CO.

Supreme Court of Utah, 1911. 38 Utah, 293, 112 P. 820.

Action by E. A. Midgley and another against the Campbell Building Company. From a judgment for plaintiff, defendant appeals.

STRAUP, J. In May, 1902, the government of the United States entered into a written contract with the appellant, the Campbell Building Company, to construct a government building at Salt Lake City, in accordance with plans and specifications prepared by the supervising architect. About 12 pages of typewriting of such plans and specifications relate to the plumbing of the building, in which are enumerated and described in detail the kind, character, quality, grade, etc., of each fixture and article to be furnished and used for such purpose. Such portion of the plans and specifications also contained a stipulation that "the required material and fixtures must in each case be in strict accordance with the specifications, and of the best quality and grade found in the market," and that "the contractor immediately after the award of the contract is to furnish for approval of the supervising architect the name and address of the manufacturer and catalogue number of the following named fixtures he proposes to use: Water-closets, urinals, slop sink, wall hydrants, fire hose rack, gate valves, pressure reducing valve, basin faucets, shower bather, and water heater."

Neither in the contract between the government and the Campbell Building Company, nor in the plans and specifications, was it stipulated or provided that the material or fixtures to be furnished and used should be made by any particular manufacturer. It, however, was made to appear by the evidence that on the 6th of March, 1903, nearly one year after the making of the contract between the government and the Campbell Building Company, and about one year before the Campbell Building Company entered into the contract with the Midgley Bros., the Campbell Building Company, by letter submitted to the supervising architect a list and catalogue number of the articles referred to, and gave Clow & Sons as the name of the manufacturer, which were then approved by the supervising architect. On the 9th of March, 1904, after receiving and accepting one of several different bids submitted by Midgley Bros., the Campbell Building Company entered into a contract with them to furnish the material for, and to do the plumbing work of, the building, by the terms of which Midgley Bros. agreed "to furnish all and singular the materials and labor necessary to complete the plumbing, gas fitting, sewerage, etc., under the specification headings from page 33½ to 45, inclusive," relating to the

plumbing, "all to be in strict and full accordance with the plans, details and specifications prepared by" the supervising architect. It was further stipulated in their contract that the "second party (Campbell Building Company) for and in consideration of the first parties (Midgley Bros.) completing and faithfully executing the aforesaid contract and by and at the time mentioned and to the full and complete satisfaction of the supervising architect and the superintendent of construction, does hereby agree to pay" Midgley Bros. the sum of $9,500 at the times and in the manner specified in the contract. There is nothing contained in the contract between the Campbell Building Company and Midgley Bros. requiring the latter to furnish or use fixtures or material manufactured by Clow & Sons, or by any particular manufacturer.

[In their subsequent performance under this contract Midgley Bros. used the identical plumbing fixtures called for by the plans and specifications, except that they were purchased from Crane & Co. rather than from Clow & Sons. It appears from the evidence that neither Crane & Co. nor Clow & Sons were the manufacturers of these fixtures, but that they were made by some other firm and that the above mentioned firms were merely jobbers. The fixtures furnished by Midgley Bros. and bought from Crane & Co. were the same fixtures shown in Clow's catalogue of 1902 and approved by the supervising architect.

[Because these fixtures were purchased from Crane & Co. and not from Clow & Sons, the supervising architect condemned and rejected them. In this suit on the contract, the defendant, Campbell Building Company, claims to have been released from the contract by reason of the breach by the Midgleys of the condition precedent of furnishing and installing the materials to the approval and satisfaction of the supervising architect.

[It is urged by the defendant that because the contract expressly conditioned their duty to pay upon "the faithful execution of the work to the full and complete satisfaction of the supervising architect," the supervising architect could properly reject the fixtures offered to be installed by the Midgleys, regardless of whether his doing so was wise or unwise, reasonable or unreasonable, capricious or otherwise. Such is not our understanding of the law applicable to cases of this nature.]

The [defendant] has referred us to numerous cases to the effect, and with which holdings we concur, that where a promisor agrees to pay for work or goods provided he is satisfied with them he cannot, if he is not satisfied, be made to accept and pay for them, or be compelled to pay for them if he rejects them; and that the right, except for fraud or bad faith, to inquire into the ground for his action, is ordinarily excluded. In such case, when he has not accepted the goods or the benefit of the work, it generally is sufficient that he said he was "not satisfied." This principle, however, is more generally applied to cases involving taste, fancy, sensibility, or judgment of the promisor. That is, if the subject-matter of the con-

tract is a coat or a painting, for which the promisor agrees to pay, if the coat or the painting is to his satisfaction, he is not obligated to accept or pay for it, if he is not satisfied, though the coat may be of the best material and workmanship and style, or the painting executed in the most artistic and skillful manner and an exact likeness of the original. But this does not give the promisor a cause of action against the tailor or painter for damages for breach of contract because the coat or painting did not satisfy the fanciful taste or capricious mental state of the promisor. It is quite enough that he in such case is not required to accept and pay for the coat or the painting, if he is not satisfied, without assigning any reason therefor, except that he is not satisfied. He may not, however, also insist that the tailor keep on making coats for him, or the painter painting pictures, until the indefinable and fanciful taste of his mind is satisfied, and upon his refusal so to do subject him to a claim for damages for breach of contract. The principle has also been applied by some of the courts to questions involving not only fancy, taste, etc., but also to what is termed by them operative fitness or mechanical utility. References to the cases may be found in 9 Cyc. 617–624.

[This principle is not, however, applicable to the class of cases to which that now under consideration belongs. It does not appear to us that there is anything particularly sentimental or fanciful, or tasteful, about water-closets, slop sinks, or basin faucets, especially in a public building. It is chiefly requisite that they be sanitary, useful, suitable, and neat. The controlling factor in the contract is not that the goods should satisfy the fancy, taste, or æsthetic sense of the supervising architect. The important thing is that they be "in strict accordance with the plans and specifications, and of the best quality found in the market." In contracts not involving personal taste the condition precedent of satisfaction contains the implied term of reasonableness.

[The instruction to the jury in the present case that "satisfactory" means "reasonably satisfactory" was not erroneous as applied to the subject matter of this contract. The verdict of the jury was amply sustained by the evidence, and the judgment for the plaintiff ought to be affirmed, with costs to the respondent. It is so ordered.] [5]

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(5) Building Laws as an Implied Condition

LONG v. OWEN.

Supreme Court of Idaho, 1912. 21 Idaho, 243, 121 P. 99, Ann. Cas. 1913D, 465.

AILSHIE, J. This action was instituted to collect the contract price for the building of two pieces of concrete sidewalk in the city of Weiser. At the time the work was done, there was in force in the city of Weiser an ordinance which prescribed the kind of material

[5] The concurring opinion of Frick, C. J., is omitted.

and the composition thereof that should be used in the construction of sidewalks, and also prescribed in detail the manner of construction, giving the specifications necessary to be observed in the construction of such walks. The contractor, who is respondent herein, after completing the work was unable to procure a certificate from the city engineer or the city council to the effect that the walk had been satisfactorily constructed in compliance with the requirements of the city ordinance. The appellant refused to pay until such certificate was produced. This action was thereupon instituted, and the respondent contended in the trial court that he had in fact constructed the walk in substantial compliance with the requirements of the ordinance, and the jury rendered a verdict in his favor for the contract price.

The contract was oral and there is a dispute between the parties as to one of the stipulations of the contract. The appellant contends that respondent agreed to build a walk in compliance with the requirements of the city ordinance, and in such manner that it would be accepted by the city authorities. Respondent denies that anything was said about compliance with the city ordinance. As we view the matter, this conflict in the evidence is immaterial. Even if nothing was said whatever about the work being done in compliance with the city ordinance, that fact would be implied, and the contractor would be obliged to do his work in substantial compliance with the ordinance before he would be entitled to recover the contract price. Where one contracts to do a piece of work, and there is at the time an existing law prescribing the specifications for that kind of work and requiring that all such work be done in accordance with the statute or ordinance, as the case may be, the statute or ordinance becomes a part of the contract, and the one who undertakes to do such work impliedly agrees to do it in such a manner as to meet the requirements of law. Lane v. P. & I. N. Ry. Co., 8 Idaho, 230, 67 P. 656. This is particularly so in a case where a contractor undertakes to construct sidewalks in a city, town, or village in which there is in force an ordinance directing and commanding that the work be done in a certain manner and in accordance with certain specifications.

Respondent attempted to obviate this difficulty by testifying that, after the difficulty arose between respondent and the city authorities over this work, the appellant told respondent to go ahead with the work and that appellant would pay for it whether the city accepted it or not. It is hardly to be supposed that a property owner would agree with any one to pay for a sidewalk constructed in violation of the city ordinance and which is likely to be torn out any day by the city authorities. If the walk was in fact done in substantial compliance with the requirements, then the contractor had the remedy to compel the issuance of a certificate showing the acceptance of the work. The contractor was in a better position than any one else to know whether he had used the materials required by the ordinance and performed the work in accordance therewith. If he failed to comply with the ordinance, it is his fault. If he did comply with the ordinance, he is in a most favorable position to show that fact,

and he has ample remedy to compel the acceptance of his work and issuance of a certificate. On the other hand the property owner who must pay for the work, and at the same time has no part in the performance thereof and does not know the manner in which it was done, should not be put to the extra expense of procuring an approval and the acceptance of the work. If the city authorities become arbitrary or unreasonable or attempt to oppress some particular contractor, it is apt to work a hardship on some one. In such a case, however, the burden should fall upon the one who assumes it and also is in the best position to meet it and on whom the greater duty and obligation rests.

One who holds himself out as a contractor to build sidewalks impliedly agrees to build them in conformity with the ordinance. He should therefore do his work in such a manner that he can compel the acceptance thereof in case he has to deal with arbitrary or unfair officials. To require the property owner to accept and pay for such work without first having the approval of the city authorities places him at a disadvantage and necessitates his assuming an extra expense.

It is practically admitted that the walk was out of line, and that a part of it did not conform to the requirements of the ordinance, and that at least a couple of squares were cracked, and that other places were so constructed that pools of water would collect and stand on the walk. On the contrary, a part of the walk seems to have been in at least a substantial compliance with the ordinance. It is clear to us from the record that the respondent was not entitled to recover the full contract price. On the other hand, he should be allowed to recover for such part of the walk as will meet the requirements of the city authorities under the ordinance.

The judgment should therefore be reversed, and it is so ordered, and the cause is remanded with directions to grant a new trial; and, if upon a new trial the respondent has not yet repaired or reconstructed the walk so as to meet the substantial requirements of the ordinance, there should be deducted from the contract price a sufficient sum to place the walk in condition that it will substantially comply with the specifications prescribed by the city authorities. Costs awarded in favor of appellant.

(C) The Doctrine of Substantial Performance

The rule applying to contracts generally, requiring strict performance in order to permit recovery, when applied to a builder becomes most inequitable, in that it gives to the owner the advantage of retention of the builder's labor and materials and at the same time relieves him from paying the contract price therefor. Thus the rule has been qualified by the introduction of the doctrine of substantial performance. Under this doctrine, the builder may recover on the contract without a literal and strict performance (the owner being compensated for the

breach in damages to be deducted from the contract price), but with these provisos to the application of the doctrine: First, the builder's breach must not be willful; and, second, the breach must not be so serious as to amount to the breach of a condition precedent.

We have already examined the effect of breach of a term expressly made a condition precedent, and we have also seen that a material breach of a material term of a contract will amount to the breach of an implied condition precedent. Any breach less than these will leave a substantial performance, at least where the breach is not willful. Thus, (1) an immaterial breach of a material term, (2) a material breach of an immaterial term, or (3) an immaterial breach of an immaterial term, will in each case leave a substantial performance for which there may be recovery of the contract price less the damages created by the breach.

JACOB & YOUNGS, Inc., v. KENT.

Court of Appeals of New York, 1921. 230 N. Y. 239, 129 N. E. 889, 23 A. L. R. 1429.

CARDOZO, J. The plaintiff built a country residence for the defendant at a cost of upwards of $77,000, and now sues to recover a balance of $3,483.46, remaining unpaid. The work of construction ceased in June, 1914, and the defendant then began to occupy the dwelling. There was no complaint of defective performance until March, 1915. One of the specifications for the plumbing work provides that "all wrought iron pipe must be well galvanized, lapwelded pipe of the grade known as 'standard pipe' of Reading manufacture." The defendant learned in March, 1915, that some of the pipe, instead of being made in Reading, was the product of other factories. The plaintiff was accordingly directed by the architect to do the work anew. The plumbing was then encased within the walls except in a few places where it had to be exposed. Obedience to the order meant more than the substitution of other pipe. It meant the demolition at great expense of substantial parts of the completed structure. The plaintiff left the work untouched, and asked for a certificate that the final payment was due. Refusal of the certificate was followed by this suit.

The evidence sustains a finding that the omission of the prescribed brand of pipe was neither fraudulent nor willful. It was the result of the oversight and inattention of the plaintiff's subcontractor. Reading pipe is distinguished from Cohoes pipe and other brands only by the name of the manufacturer stamped upon it at intervals of between six and seven feet. Even the defendant's architect, though he inspected the pipe upon arrival, failed to notice the discrepancy. The plaintiff tried to show that the brands installed, though made by other manufacturers, were the same in quality, in appearance, in market value, and in cost as the brand stated in the contract—that they were indeed, the same thing, though manufactured in another place. The evidence was

excluded, and a verdict directed for the defendant. The Appellate Division reversed, and granted a new trial.

We think the evidence, if admitted, would have supplied some basis for the inference that the defect was insignificant in its relation to the project. The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture. Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238. * * *

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it. * * * We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition. This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression. Schultze v. Goodstein, 180 N. Y. 248, 251, 73 N. E. 21; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, 490, 56 N. E. 995. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong. Spence v. Ham, supra.

In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing. Some of the exposed sections might perhaps have been replaced at moderate expense. The defendant did not limit his demand to them, but treated the plumbing as a unit to be corrected from cellar to roof. In point of fact, the plaintiff never reached the stage at which evidence of the extent of the allowance became necessary. The trial court had excluded evidence that the defect was unsubstantial, and in view of that ruling there was no occasion for the plaintiff to go farther with an offer of proof. We think, however, that the offer, if it had been made, would not of necessity have been defective because directed to difference in value. It is true that in most cases the cost of replacement is the measure. Spence v. Ham, supra. The owner is entitled to the money which will permit him to complete, unless the cost of comple-

tion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. "There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable." Handy v. Bliss, 204 Mass. 513, 519, 90 N. E. 864, 134 Am. St. Rep. 673, Cf. Foeller v. Heintz, 137 Wis. 169, 178, 118 N. W. 543, 24 L. R. A. (N. S.) 327; Oberlies v. Bullinger, 132 N. Y. 598, 601, 30 N. E. 999; 2 Williston on Contracts, § 805, p. 1541. The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end.

The order should be affirmed, and judgment absolute directed in favor of the plaintiff upon the stipulation, with costs in all courts.[6]

NORTH AMERICAN WALL PAPER CO. v. JACKSON CONSTRUCTION CO. et al.

Supreme Court of New York, Appellate Division, First Department, 1915. 167 App. Div. 779, 153 N. Y. S. 204.

LAUGHLIN, J. This is an action to foreclose a mechanic's lien. The plaintiff sues in the right of the copartnership firm of Glick & Eckstein, who had a contract with the appellant for varnishing, painting, papering, and decorating three five-story apartment buildings, containing 93 apartments. The contract provided that the plaintiff's assignors should do all the work for the gross sum of $3,200. They were paid $2,150 on account, and the plaintiff by this action sought to foreclose the lien for the balance. It alleged complete performance by its assignors, excepting in so far as performance was waived. The principal questions litigated on the trial were concerning performance by the plaintiff's assignors with respect to varnishing the floors, enameling the dadoes and tubs in the bathrooms, and painting the bathrooms, kitchens, and bedrooms. With respect to these matters, the plaintiff claimed full performance, and failed to give any evidence tending to show a waiver of complete performance. Testimony of a general nature was offered, in behalf of the plaintiff, tending to sustain its contention that the contract was fully performed in these respects; but more definite testimony was offered in behalf of appellant to the con-

[6] The dissenting opinion of McLaughlin, J., is omitted.

trary, and the learned trial court found, and we agree with his determination, that it outweighs the evidence offered in behalf of the plaintiff. The court did not find, and on the evidence could not have found, that there was any waiver of performance with respect to this part of the work. The court did, however, find that the plaintiff's assignors performed their contract with the exception that they "did not complete the bathrooms and a number of the floors as required in and by the terms of the said agreement," and that by reason of their failure "to so complete said contract, the defendant Jackson Construction Company is entitled to a credit therefor of the sum of $450." Without any finding of good faith on the part of plaintiff's assignors, or that the work omitted was omitted through oversight or excusable neglect, the court sustained the lien for the balance of the amount unpaid, to wit, $600, and decreed a foreclosure.

The principal question presented by the appeal is whether, in view of the pleadings and of this finding with respect to the value of the work omitted by the plaintiff's assignors, from which plaintiff has not appealed, the judgment can be sustained. The omission aggregated about 14 per cent. of the entire contract price of the work. If the evidence showed, or tended to show, that the plaintiff was entitled to recover on the theory of substantial performance, we could, if the ends of justice required it, find substantial performance or grant a new trial. An examination of the evidence, however, convinces us that the plaintiff would not be entitled to recover even on the theory of substantial performance.

The courts have been quite liberal in these suits in equity to sustain a cause of action in favor of one who has attempted in good faith to perform his contract, but has, through oversight, misunderstanding, or any excusable neglect, failed to completely perform in certain respects deemed unsubstantial, for which the owner may be adequately indemnified by an allowance and deduction from the contract price for the work, and in such case, on an allegation of full performance, permit a recovery on the theory of substantial performance, where the contractor shows the cost of performing the omitted work. Woodward v. Fuller, 80 N. Y. 312; Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238. * * *

But there is a limit to the application of this rule, and a party who knowingly and willfully fails to perform his contract in any respect, or omits to perform a substantial part of it, cannot be permitted, under the guise of this rule, to recover for the value of the work done; and the trend of the more recent decisions is to hold the percentage of omitted work may, in and of itself, be sufficient to show that there has not been a substantial performance. * * * It fairly appears by the evidence that after the plaintiff's assignors varnished some of the floors, the plaster fell from the ceilings without any fault on their part, and that the fall of the plaster and the work incident to removing it and to replastering and repairing the plaster injured the varnish. That, of course, would be no bar to a recovery; but by the terms of the contract the plaintiff's assignors guaranteed that the varnish would not

"scratch or turn under water," and the uncontroverted evidence shows that they purchased and used an inferior brand of varnish, which would not hold firm when wet, although the same manufacturer made a higher priced varnish which would withstand water. The evidence shows that the varnish was unsuitable for this work, that it softened when wet and dried up and became loose and could be swept into piles. This is the evidence, doubtless, upon which the court predicated the finding of failure fully to perform with respect to the floors. The plaintiff's assignors were obligated by their contract to paint the walls of the kitchens and bathrooms with three coats of paint, and to paint the dadoes and the outside of the tubs in the bathrooms with three coats of paint "and an extra coat of Chicago eggshell enamel." General evidence was given on the part of the plaintiff tending to show complete performance of the work in the bathrooms, and also specific evidence was given in its behalf to the effect that a coat of eggshell enamel was put on the bathroom dadoes and the outside of the tubs after the painting, as provided in the contract. On the part of the appellant, however, testimony was given to the effect that this coat of enamel was not put on in any of the bathrooms, and that the cost of doing this work would be $325.50. The evidence is conflicting as to whether the other painting required to be done in the bathrooms was performed in accordance with the contract, and it would justify a finding that it was not so performed. It does not appear from the finding, made by the trial court, with respect to the failure of plaintiff's assignors to complete the bathrooms, whether the court intended to find that there was a failure to complete in both of these respects, or only in one. There is, however, ample evidence to sustain a finding that there was a failure to do the enameling required, and since performance of that work was not waived, it cannot be said that it was not a substantial part of the work, or that its performance was omitted through an oversight, as to which there is no evidence.

We accept, therefore, the finding of the trial court to the effect that there was a failure to perform work of the value of $450 with respect to the floors and bathrooms, and on that finding, in view of the evidence to which we have alluded, we think the plaintiff was not entitled to recover, for it constituted a substantial part of the contract work. There is evidence tending to show that the plaintiff's assignors did not perform in other respects, which would have justified a finding to that effect. The evidence fairly shows a disregard on the part of the plaintiff's assignors of their contract obligations and a deliberate attempt on their part to use material different from that required by the contract. It is claimed that there is evidence in the case tending to show that plaintiff's assignors did over certain work injured through no fault of theirs, but that was not satisfactorily shown; and, as no claim for extra work was asserted, we cannot attempt to even up the equities by making an allowance on account of such extra work.

It follows that the findings of fact and conclusions of law and judgment should be modified in accordance with these views, so that it will appear thereby that the plaintiff's assignors did not, in good faith,

endeavor to complete performance of their contract, and did not substantially perform, and failed to perform, substantial and material work of the reasonable value of $450, and directing the dismissal of the complaint, with costs, but in all other respects allowing the judgment to stand in favor of the defendant Sinnott.

Settle order on notice. All concur.

MANITOWOC STEAM BOILER WORKS v. MANITOWOC GLUE CO.

Supreme Court of Wisconsin, 1903. 120 Wis. 1, 97 N. W. 515.

Action to recover the contract price and enforce a lien for supplying a steam boiler to the defendant. The evidence disclosed that the defendant operated a glue factory, requiring a large amount of steam, not only for power, but also for heating and drying; that it had an old tubular boiler, which had been manufactured by the plaintiff, and with which and its use the plaintiff was entirely familiar; that in such situation the parties negotiated for a new boiler, the defendant stating to the plaintiff that the old boiler was inadequate—that it had a commercial rating of about 80 horse power, and that one was needed of about 100 horse power. The plaintiff's manager counseled one still larger, namely, to rate about 125 horse power, as compared with the old one, 80 horse power. The agreement finally reached was that the new one should be substantially of 50 per cent. more capacity than the old, but was to be of the Scotch type, instead of the tubular type. Plaintiff constructed a boiler of the Scotch type, put it in place in a building and upon brick foundation constructed by the defendant for that purpose. After it was connected up, it was found disappointing in capacity, and not up to the old boiler, but was used, in connection with the old one, to furnish the steam necessary for the factory, while efforts were made both by plaintiff and defendant to make it work more efficiently. These efforts being still unsatisfactory, the defendant complained of the boiler as not satisfying the contract, and, as the defendant's manager testifies, desired to have it taken away. [A little later, this suit was brought for the contract price of the new boiler.] At the close of the evidence the court made findings to the effect that the contract was as above stated, and that the boiler put in, instead of being 50 per cent. greater capacity than the old one, was about 20 per cent. less capacity, and announced that upon the then state of the pleadings the defendant would be entitled to a judgment dismissing the complaint, but, on the theory that the defendant had offered some evidence of the reasonable value of the boiler and had accepted the same, the court entered an order that the plaintiff might amend his complaint by adding a count in quantum meruit. [This was done, and at the ensuing trial defendant offered expert testimony that the boiler supplied would be worth approximately $1,800 less than a boiler of the capacity contracted for. Thereupon the court made findings that the plaintiff had substantially

performed its contract, except that, instead of a boiler 50 per cent. greater than the old one, it had supplied one of about 20 per cent. less capacity, that defendant had accepted the boiler, and that the reasonable value thereof was original contract price, for which judgment was rendered. Defendant prosecuted this appeal.]

DODGE, J. The result of this action, whereby the defendant is required to pay the full contract price for a boiler of only about one-half the capacity or value of that for which it agreed to pay, is somewhat startling, especially in view of the consideration, understood by both parties, that its only reason for buying a new boiler at all was that the operation of the factory required more steam than the old one could supply. Before reaching such a result, a court should pause to re-examine the rules of law or processes of reasoning upon which it is based. If the law warrants it, the force or value of a contract seems to have vanished. The contractor receives the same compensation for nonperformance as for performance. The general rule of law is firmly established that he who makes an entire contract can recover no pay unless he performs it entirely and according to its terms. * * * This general rule has, with considerable hesitation, been relaxed for equitable considerations in certain exceptional situations where it is believed to work hardship:

First, in favor of laborers who contract to perform personal services, and without fault of either party fail of complete performance; * * * secondly, in building contracts, where the contractor constructs something on the land of another which by oversight, but in good-faith effort to perform fails to entirely satisfy the contract, but is so substantially in compliance therewith that the structure fully accomplishes the purpose of that contracted for, and the other party voluntarily accepts the benefit thereof, or where the failure is mere inconsiderable incompleteness, and the expense of completion is easy of ascertainment; * * * and, thirdly, where the contractor supplies an article different from or inferior to that promised, and the recipient, having full opportunity to reject without loss or injury, decides to accept and retain the thing furnished. This third phase is hardly an exception, for such voluntary acceptance may well be deemed the making of a new contract to take and pay reasonably for the article which does not satisfy the original contract. * * *

Proceeding to ascertain how far these principles are applicable to the situation at bar, we are confronted by the fact that substantial performance of the express contract is wholly wanting. The finding is that the boiler furnished was about 82 per cent. of the capacity of the old one, instead of 150 per cent., and that the increase of capacity was the vital and essential part of the contract. This is in no sense substantial performance. The boiler does not serve at all the purpose which the larger one would have served, and for which it was purchased. Defendant can obtain that for which it contracted, and for which it agreed to pay $2,035, and which is necessary to the purpose which induced the contract, in only one of two ways: either it can remove this boiler from its premises at large expense, if plaintiff does not remove it,

and purchase and put in place another of the required size; or it can retain it, and put in another of substantially equal capacity as auxiliary to it, and at a cost equal to or greater than the original contract price, and probably necessitating reconstruction of his boiler house. One in such predicament cannot be said to have received in substance that for which he contracted. Malbon v. Birney, supra [11 Wis. 107]; Fuller, etc., Co. v. Shurts, supra [95 Wis. 606, 70 N. W. 683]. Neither do we discover either finding or proof that defendant had accepted the boiler, had decided to keep it, and use it so far as it will go toward supplying the needed steam.

True, the trial court argues that it would be inequitable to allow defendant to keep the boiler and pay nothing for it, but does not find that it has elected to do so. * * * Doubtless the fact, unexplained, that defendant made use of the boiler, which had been built into its boiler house and connected with the steam pipes in its factory, is an evidentiary circumstance having some tendency to show acceptance, but such conduct is by no means conclusive when a party cannot forego use of the appliance without at the same time giving up the use of his own premises. Thus one whose land has been plowed by another cannot be said to accept that plowing as a service merely because he sows seed and raises a crop on the land. Smith v. Brady, 17 N. Y. 188, 72 Am. Dec. 442. Nor because a city runs sewerage through filter beds at its sewer outlet does it necessarily accept them. Madison v. Amer. San. Eng. Co. (Wis.) 95 N. W. 1097. Nor because the owner lives in his house, and uses the defective furnace therein, does he necessarily accept the latter. Williams v. Thrall, supra; Fuller, etc., Co. v. Shurts, supra. Nor because one takes his own logs does he accept the cutting and driving done upon them by another. McDonald v. Bryant, 73 Wis. 20, 26, 40 N. W. 665. * * *

The result is that at the close of the trial there was no evidence to support a recovery on the contract, and the court should have rendered judgment dismissing the complaint. Neither was there evidence to support a cause of action quantum meruit. * * *

Judgment reversed, and cause remanded, with directions to enter judgment dismissing the complaint.

GILLESPIE TOOL CO. v. WILSON et al.

Supreme Court of Pennsylvania, 1888. 123 Pa. 19, 16 A. 36.

[Action by the Gillespie Tool Company against R. J. Wilson & Tener, to recover for boring a gas well. The contract of the plaintiff company was to put down and case a gas well for the defendants, 2,000 feet deep, to be 8 inches in diameter for 400 feet, to shut off fresh water, and below that, to the bottom, to be 5⅝ inches in diameter. If salt water was found below 400 feet, the 5⅝-inch casing to be drawn, and the hole reamed out to 8 inches in diameter, to shut off salt water, then 5⅝-inch hole to the bottom. The well was put down the 2,000

feet, but the diameter was not as specified in the contract. It was an 8-inch hole to the depth of 940, to 1,820 a 5⅝-inch hole; and from that to the bottom a 4¼-inch hole. At the depth of 1,729 feet, a salt rock was struck, nearly 100 feet in thickness. To shut off this salt water and finish the well 5⅝ inches in diameter, the casing from 940 to 1,820 feet would have to be drawn, and the hole reamed out to 8 inches in diameter. Instead of doing that, the plaintiff inserted casing inside the 5⅝-inch casing, and this shut off the salt water, but in consequence thereof could make the well below only 4½ inches in diameter. The court below dismissed the suit on the ground that plaintiff had not made out a substantial performance of the contract.]

STERRETT, J. Plaintiff company neither proved nor offered to prove such facts as would have warranted the jury in finding substantial performance of the contract embodied in the written propositions submitted to and accepted by the defendants. In several particulars the work contracted for was not done according to the plain terms of the contract. Nearly one-half of the well was not reamed out, as required, to an 8-inch diameter, so as to admit 5⅝-inch casing in the clear. About 180 feet of the lower section of the well, also, was bored 4 or 4¼ inches, instead of 5⅝ inches in diameter. In neither of these particulars, nor in any other respect, was there any serious difficulty in the way of completing the work in strict accordance with the terms of the agreement. To have done so would have involved nothing more than additional time and increased expense. The fact was patent, as well as proved by undisputed evidence, that a 4¼-inch well would not discharge as much gas as one 5⅝ inches in diameter. It is no answer to say that, for the purpose of testing the territory, a 4¼-inch well was as good as a 5⅝-inch well; nor that reaming out the well to the width and depth required by the contract would have subjected defendants to additional expense without any corresponding benefit. That was their own affair. They contracted for the boring of a well of specified depth, dimensions, etc., and they had a right to insist on at least a substantial performance of the contract according to its terms. That was not done, and the court was clearly right in refusing to submit the case to the jury on evidence that would not have warranted them in finding substantial performance of the contract.

The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contract in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no willful omission or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury. * * *

Judgment affirmed.

BETTINI v. GYE.

High Court of Justice, Queen's Bench Division, 1876. 1 Q. B. Div. 183.

[Defendant was the director of the Royal Italian Opera in London, and the plaintiff was a dramatic artist and professional singer. Plaintiff contracted to sing for defendant from March 30, 1875, to July 13, 1875, and agreed to be in London "without fail" at least six days before the commencement of his engagement, for the purpose of rehearsals. The defendant refused to receive the plaintiff into his service under the contract. The defendant pleaded, in this action on the contract, that the plaintiff was not in London six days before the commencement of the engagement for the purpose of rehearsals.]

BLACKBURN, J. * * * The question * * *, is not whether the plaintiff has any excuse for failing to fulfill this part of his contract, which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfill his, the defendant's, part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. * * *

We think the answer to this question depends on the true construction of the contract taken as a whole. Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

In this case, if to the seventh paragraph of the agreement there had been added words to this effect: "And if Mr. Bettini is not there at the stipulated time, Mr. Gye may refuse to proceed further with the agreement;" or if, on the other hand, it had been said, "And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes default, and he shall forfeit twice his salary for that time," there could have been no question raised in the case. But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other,

we think it must be taken to be or not to be intended to be a condition precedent. * * *

The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning anything in London from the 1st of January to the 30th of March, and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shows they must be so.

And, as far as we can see, the failure to attend at rehearsals, during the six days immediately before the 30th of March could only affect the theatrical performances and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing rooms, and concerts, for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent. The defendant must, therefore, we think, seek redress by a cross-claim for damages. * * * Judgment for the plaintiff.

SECTION 2.—PREVENTION AS EXCUSE FOR NONPERFORMANCE

UNITED STATES v. UNITED ENGINEERING & CONSTRUCTING CO.

Supreme Court of the United States, 1914. 234 U. S. 236, 34 S. Ct. 843, 58 L. Ed. 1294.

[Appeal from the Court of Claims to review a judgment against the United States in a suit upon a contract for public work. Affirmed.]

Mr. Justice DAY delivered the opinion of the court.

Suit was brought in the court of claims by the United Engineering & Contracting Company to recover of the United States upon a contract, dated the 15th of September, 1900, for the construction within seven calendar months from the date of the contract, namely, by April 15, 1901, of a pumping plant for Dry Dock No. 3 at the New York Navy Yard, the work to be done in accordance with certain plans and specifications annexed to and forming a part of the contract. The claimant recovered a judgment (47 Ct. Cl. 489), and the United States brings this appeal.

The principal question in the case involves the correctness of that part of the judgment of the court of claims which permitted the claimant to recover $6,000, which the government had deducted as liquidated damages for 240 days' delay in the completion of the work, at the

rate of $25 per day. To understand this question the terms of the contract and certain facts found by the court of claims, upon which the case is to be considered here, must be had in view.

[The claimant commenced the construction of the work in accordance with the contract, and after a portion thereof had been done, the plans and specifications furnished by the government were found defective. The government then made changes in the work to be done and at times caused entire cessation of the work. Three supplemental agreements were made, not containing any provision for liquidated damages. Further delay was caused by the government's use of the docks for docking vessels.] The work was completed and accepted finally by the government on April 5, 1905.

Notwithstanding the delays of the government, the court of claims found that the claimant, with reasonable diligence, could have completed the plant for tests during the period by about September 21, 1903, and found that if it was chargeable for the delay according to the liquidated damage clause of paragraph 12 of the specifications of $25 per day, the deduction would be $750 less than the government had deducted. But it found that, if the claimant was only liable for actual damages, and it did so determine, since there was no evidence as to such damages, the claimant was entitled to recover the entire amount deducted. * * *

[The sole question for determination here is whether, when the work was delayed solely because of the government's fault beyond the time fixed for completion, the claimant can be charged the $25 per day for each day of delay according to the liquidated damage clause of the contract, or whether this breach of the time term of the contract has been excused by the prevention.] We think the better rule is that when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time, and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date, to do this would permit it to recover damages for delay caused by its own conduct. * * *

[Judgment affirmed].[7]

[7] In Anvil Mining Co. v. Humble, 153 U. S. 540, 14 S. Ct. 876, 38 L. Ed. 814 (1894), Brewer, J., said: "A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other

SECTION 3.—ANTICIPATORY BREACH AS EXCUSE FOR NONPERFORMANCE[8]

1. In General

O'NEILL v. SUPREME COUNCIL, AMERICAN LEGION OF HONOR.

Supreme Court of New Jersey, 1904. 70 N. J. Law, 410, 57 A. 463, 1 Ann. Cas. 422.

[Action by Thomas O'Neill against the Supreme Council, American Legion of Honor, for breach of contract of insurance. It appears from the facts that in 1891 the defendant entered into a contract of insurance with the plaintiff whereby the defendant, in consideration of the payment of annual premiums by the plaintiff, agreed to pay into plaintiff's estate upon his death the sum of $5,000; that in 1901, after the contract had been in operation for ten years and plaintiff had faithfully made payments of the premiums due during the period, defendant has repudiated the contract, and now refuses to pay the said sum to plaintiff's estate in the event of plaintiff's death, and refuses to accept from plaintiff any further payment of premiums, and refuses to recognize the contract as still in force. For which alleged breach of contract this action is brought.]

PITNEY, J. * * * [The question for consideration is whether under these facts there has been any actual breach of contract.] The cause of action asserted is not the right to recover the sum named in the benefit certificate according to its terms, but to recover damages for a renunciation of the agreement, by the party bound, in advance of the time set for performance.

party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed. It may stop and sue for the damages which it has sustained by reason of the nonperformance which the other has caused."

The theory upon which the courts treat the contract as broken is that duties of performance are always impliedly conditioned upon noninterference, and that it is this implied term of the contract which has been broken.

Where one party to a contract is prevented by the other from performing, he may either (1) refuse further performance, treating the contract as at an end, and sue for damages for the breach or in quantum meruit for his part performance; or (2) he may elect to proceed with the contract and use the prevention as an excuse for all delay occasioned thereby.

[8] The effect of renunciation of a contract by one of the parties before the time of performance is (1) to excuse the other party from further performance, and (2) to give him an immediate right to sue for damages, without waiting for the time of performance to arrive. This is the doctrine of anticipatory breach; and it is founded upon the theory that the mutual promises of the parties to any contract carry with them implied promises to maintain the contractual relation up to and including the time for performance. It is for the breach of this implied promise that the action is maintained.

Numerous reported decisions have laid down * * * that where * * * one party [to a contract] either disables himself from performing, or prevents the other from performing, or repudiates in advance his obligations under the contract, and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may at his option treat the contract as terminated for all purposes of performance, and maintain an action at once for the damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance by the defendant. This doctrine has been followed in the English courts for more than a half century. * * *

In the leading case of Hochster v. De La Tour [(1853) 2 El. & B. 678, 22 L. J. Q. B. 455, 17 Jur. 972, 6 Eng. Rul. Cas. 576], Crompton, J., said, during the argument: "When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract." * * * The same rule prevails in the Supreme Court of the United States. Roehm v. Horst (1899) 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, where numerous * * * decisions of the same court are cited. And the great weight of authority in the state courts is to the same effect. * * *

The doctrine of Hochster v. De La Tour is generally recognized by the text-writers as established law. * * * So far as observed, the only states dissenting from the doctrine are Massachusetts, Nebraska, and North Dakota. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757; * * * Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760. * * *

The general question of repudiation of contracts is ably discussed by Prof. Williston in 14 Harv. Law Rev. 317, 421, with an ample citation of cases. He combats the doctrine of Hochster v. De La Tour, while conceding that it is sustained by the great weight of authority. * * *

Upon the whole, we are satisfied that the doctrine [of anticipatory breach] is well founded in principle as well as supported by authority. We are also clear that it applies to such a contract as the one in suit; and that the declaration sets forth a renunciation so clear and unequivocal as to give ground for an action, it being averred that the defendant has declared to the plaintiff that it will not perform the contract, and has refused to accept the [premiums] tendered by the plaintiff in performance of conditions precedent on his part. * * *

The plaintiff is entitled to judgment.

WOLF v. MARSH.

Supreme Court of California, 1880. 54 Cal. 228.[9]

SHARPSTEIN, J. [This is a suit on a promissory note, of which the following is a copy:]

"[449.00.] Martinez, November 24th, 1866.

"For value received, I promise to pay to S. Wolf, or order, four hundred and forty-nine dollars with interest at one per cent. per month from date until paid, principal and interest payable in United States gold coin. This note is made with the express understanding that if the coal mines in Marsh Ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void.

"[Signed] C. P. Marsh."

[It appears from the evidence that at the time this note was signed, Marsh, the defendant, was half owner in the said ranch, and that he continued as said half owner for the next five years following, when he conveyed his interest in the said ranch to one Williams. During the time the defendant held the ranch the mines had yielded him no profits. This action was commenced within four years of said conveyance.]

Upon the point that the action was barred by the Statute of Limitations, it is sufficient to remark, that we are unable to discover any ground upon which that point can be sustained; and if we are right in the view which we take of the other point, it must be apparent that the statute did not commence running more than four years before the commencement of this action. The instrument sued upon consists of two parts: A promissory note, and a condition upon which it was not to be paid, but to be null and void. That condition was, that the coal mines in the Marsh Ranch should yield no profits to the defendant. If they at any time should yield profits to him, the note would then become due and payable. From that time the Statute of Limitations would commence to run, because at that time a cause of action would accrue upon the note. Prior to the 1st day of November, 1871, the date of defendant's conveyance to Williams, the mines had yielded no profits to defendant, and if he had retained his interest in them up to this time, or for any length of time, without their yielding any profits to him, no cause of action would have accrued upon the note. But, as before remarked, upon the mines yielding profits to the defendant, the note became due and payable eo instante.

Before the mines had yielded any profits to the defendant, he sold and conveyed his interest in them to a stranger. By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary, that "if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued

[9] Statement of facts is omitted.

therefor, without demand, even though the time specified for performance has not expired." Bishop on Cont. § 690.

That this case is within that principle, we do not entertain a doubt. When the note was executed, the defendant was a half owner of the mines, which were leased on such terms that the production of coal from them must have yielded him a profit. After making the note, he voluntarily committed an act which made it impossible for the contingency upon which the note would become due and payable ever to arise. When he did that, he violated his contract, and the note at once became due and payable; and as this action was commenced within four years after that, it follows that the judgment and order of the court appealed from must be affirmed.

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2. Limitations on the Doctrine of Anticipatory Breach

(a) Does Not Apply to Promises to Pay Money

The doctrine of anticipatory breach has never been applied to promises to pay money. A note due at a certain time can be sued on only when the due date arrives; no repudiation by the debtor in advance of the time of performance can give any immediate right of action to the creditor.

(b) Where One Party Repudiates the Contract in Advance of the Time of Performance, the Other Party Cannot Continue His Performance and Increase the Damages

CLARK v. MARSIGLIA.

Supreme Court of New York, 1 Denio, 317, 43 Am. Dec. 670.

[Action on a contract for work, labor and materials, in cleaning, repairing and improving sundry paintings belonging to defendant. The plaintiff proved that a number of paintings were delivered to him by the defendant to clean and repair at an agreed price of two hundred and thirty-one dollars. The defendant gave evidence tending to shew that after the plaintiff had commenced work upon them, he desired him not to go on, as he had concluded not to have the work done. The plaintiff, notwithstanding, finished the cleaning and repairing of the pictures, and claimed to recover for the whole, insisting that the defendant had no right to countermand the order which he had given. The defendant's counsel requested the court to charge that he had the right to countermand his instructions for the work, and that the plaintiff could not recover for any work done after such countermand. The court declined to charge as requested, but, on the contrary, instructed the jury that inasmuch as the plaintiff had commenced the

work before the order was revoked, he had a right to finish it, and to recover the entire contract price.]

PER CURIAM. * * * The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.

To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer. The judgment must be reversed, and a venire de novo awarded.

Judgment reversed.

SECTION 4.—WAIVER AS EXCUSE FOR BREACH OF CONDITIONS

JOBST v. HAYDEN BROS. et al.

Supreme Court of Nebraska, 1909. 84 Neb. 735, 121 N. W. 957, 50 L. R. A. (N. S.) 501.

CALKINS, C. This was an action by the plaintiff to foreclose a mechanic's lien upon a building which he had erected under a written contract with the defendant, Hayden Bros., a corporation, hereinafter called the "owner." A portion of his claim was for the balance of the contract price, to which were added, for extras, sundry items. The owner contested a portion of these claims for extras and demanded a large sum for defects in construction and damages for delay in the completion of the building. The district court allowed part of

plaintiff's claim for extras and deducted from the plaintiff's contract price for defects in construction, $100 for the freezing of the west wall, and $500 on account of defective floor topping. It found that the owner agreed to and did release the plaintiff from any and all claims for damages on account of delay in completing the building and rendered judgment against it for the sum of $9,520.38.

1. It appears: That the plaintiff first entered into a contract with the owner for the construction of a building which was designed with re-enforced concrete columns on the 28th day of March, 1905; that the city inspector, not being at that time acquainted with this method of construction, refused to approve the plans, and the design was changed so as to call for steel columns in place of the other; and that on April 12th an additional contract was made providing for the latter construction and for the payment of the increased expense that the same entailed. Between the date of the execution of these two contracts, a contract was entered into between the plaintiff, on the one part, and the defendants Lehmer and Collins, on the other, which recited that the latter had the exclusive agency for a certain system of re-enforced concrete construction, and provided that certain specified parts of whatever work of that class should be contracted for by the plaintiff should be executed by the said Lehmer and Collins. After the making of the contract between the plaintiff and the owner, the plaintiff entered into a supplemental contract with Lehmer and Collins in reference to the construction of the Hayden building, under which the plaintiff agreed to execute certain specified parts of such construction, and the said Lehmer and Collins agreed to execute certain other parts, each for a fixed price. The plaintiff filed a mechanic's lien for the entire amount claimed to be due upon the contract, and Lehmer and Collins filed a lien for the amount claimed to be due them on the theory that they were to be regarded as subcontractors. * * *

4. The contract contained the provision that: "No alteration shall be made in the work done or described by the drawings and specifications except upon a written order from the architect, and when so made the value of the work added or omitted shall be computed by the architect, and the amount so ascertained shall be added to or deducted from the contract price." The court included in its decree six items for which it is contended the architect had not made a written order, and it is insisted as a matter of law that, under the above-quoted provision, they cannot be allowed. Only two of these items are argued in the brief. It is admitted that, on account of the caving in of the earthen embankment during the winter, it was found expedient to extend the basement and subbasement some eight feet further into the street than was originally intended. This involved going that distance beyond the curb, which was the boundary according to the original plans. It necessitated additional brickwork and the use of heavier steel to support the weight of the roadway above. It is not contended that the work was not performed with the knowledge and under the direction of the architect, and that it imposed an extra burden and additional expense upon the contractor. The other item was for a

change in the form of foundation in the northern part of the west wall made necessary, or at least expedient, by conditions which we will notice more fully hereafter. It is enough to say that it was found impracticable to proceed with the work in this part of the construction according to the original specifications. There was a sketch or plan for the new work, which the testimony shows was approved by the architect; but this document had apparently been lost at the time of the trial. There is no question made as to the merit of these claims, but it is insisted that the above-quoted clause in the contract prohibits their allowance. We do not think this clause susceptible of the construction contended for. It does not provide that the contractor shall forfeit his right to compensation for extras performed by him at the request of the owner or the architect without the written direction stipulated for. The evidence abundantly establishes that the extras so complained of were performed at the direction and upon the request of the owner and architect, and the clause in the contract quoted does not prevent their allowance. * * *

6. The contract provided that the plaintiff was to finish and deliver to the owner the subbasement and basement on or before the 1st day of June, 1905, and to complete and turn over the whole building on or before the 1st day of September in the same year, and it contained the stipulation that if the contractor should fail to deliver said building complete in every respect on the 1st day of September, 1905, he should pay the owner as liquidated damages the sum of $25 per day for each day after the 1st day of September, 1905, until the building should be delivered by him, unless he was prevented from so doing by some of the causes which the contract provided should be a sufficient excuse for delay. The building was not in fact completed until the following June. The evidence shows that the rental value of the building complete exceeded the sum of $25 per day, and the owner claims that it should be allowed that amount under the provisions of this contract. The plaintiff claims that the delay in the completion of the work was caused by the failure to finish the excavation, and, further, that in July, 1905, the owner agreed to waive the time clause in the contract. The court below made no finding as to the cause of the delay, but found that the owner waived the time clause and agreed to and did release the plaintiff from any and all claims on account of delays in completing the building within the time limited in the contract. The owner argues that the evidence does not sustain this finding, but a careful reading of the testimony convinces us that this contention cannot be maintained, and that the finding of fact by the district court is fully sustained. Further, the owner insists that, if such a promise was made by it, it was without consideration and therefore invalid as a contract, and that it was not acted upon by the plaintiff so as to estop the owner from insisting upon its invalidity. We are of the opinion that the contention of the owner upon this point must be sustained, and that its promise to waive the time clause, being without consideration, is void as a contract, and that, the plaintiff not being shown to have

acted upon the same, the owner is not estopped now to make a claim for such damages.

7. It does not, however, follow that the promise of the owner, though not amounting to a contract nor estopping it to claim damages for delay, had no effect whatever. The provision of the contract respecting delays which should extend the plaintiff's time for the completion of the building was as follows: "Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner or architect or any other contractor employed by such owner upon the work, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid. But no such allowance shall be made unless a claim therefor is presented in writing to the architect within 24 hours of the occurrence of such delay. The duration of such extension shall be certified to by the architect." It does not appear that the plaintiff made a claim in writing to the architect for an extension of time in accordance with these provisions, and it is very strenuously insisted that, in the default of having taken such action, he is precluded now from showing that he was delayed by the fault of the owner or other contractors. If it be true, as the district court found, and its finding as we have seen must be here sustained, that the owner made this agreement, and the plaintiff, relying upon its promise, neglected to make his claim in writing, we think the owner should be and is estopped to insist upon the provisions of this clause. It would have been an idle act for the plaintiff to ask an extension when the owner had already promised not to insist upon the completion of the building at the time stipulated. Such a promise naturally lulled the contractor into a sense of security and was well calculated to prevent him from taking steps under the provisions of the contract quoted. We therefore conclude that the plaintiff was entitled to an extension of the time equal to the period of delay caused by the failure of the owner to have his property in condition for the erection of the building. * * *

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the case remanded for further proceedings in accordance with this opinion.

DOUGLASS & VARNUM v. VILLAGE OF MORRISVILLE.

Supreme Court of Vermont, 1915. 89 Vt. 393, 95 A. 810.

[Action by Douglass & Varnum, general contractors, for the contract price of a dam and spillway constructed by the plaintiffs for defendant.]

WATSON, J. * * * It appeared that on July 2, 1906, the village of Morrisville, by its water and light commissioners, entered into a written contract with the plaintiffs, Douglass & Varnum, containing provisions material to be noticed, as follows:

"The said Douglass & Varnum agree to construct a concrete masonry dam and steel penstock and to furnish all labor and material and perform all work called for in specifications hereto attached and in plans used in connection therewith, for the improvement of the electric light and power plant for the village of Morrisville at Cadys Falls, in the town of Morristown, Vermont, for the price of fifty thousand, seven hundred and twenty-seven dollars and eighty cents ($50,727.80).

"Said work shall be undertaken and performed under all the terms and conditions of the specifications hereto attached, with the following exceptions:

"The work shall be performed according to the plans and drawings prepared by H. M. McIntosh, which plans and drawings are made a part of this contract, except that such part of the dam as is west of the spillway shall be built to an elevation of 106.35 instead of 108.35 as shown on said plans. * * *

"Contractors submitting bids or tenders on this work are expected to compare plans and specifications with the site and no demands or allowances shall be made on account of any misunderstanding of the plans and specifications.

"No estimates of quantities will be furnished by the owners, but the contractor must examine the plans and specifications, comparing them with the site, and the lump sum bid must cover the total expense of securing a proper foundation and building the work specified to lines and levels and in the manner called for in the plans and specifications. * * *

[Plaintiffs are here suing for the contract price of $50,000 for completion of the dam and spillway in accordance with the terms of the written agreement; and also for the sum of $17,118.05 for extra work performed in connection with necessary excavation and concrete filling of a portion of the river bed for the foundation of the dam. Defendant maintains that the said excavation and concrete fill were included within the scope of the contract and therefore do not constitute extra work; and further, that even though the said work be construed as not included in the contract, plaintiff cannot recover therefor, for the reason that no order in writing authorizing such extra work was obtained by the plaintiff as required by the following clause of the contract:]

"Any work which may be found necessary to perform that is not covered by this specification and the contract, must be covered by an order in writing by the owners or their representatives and will be paid for at actual cost, plus 10 per cent.

"No allowance or payment will be made for any work performed, or material furnished, not covered by the contract or such order." * * *

The bill of exceptions further states that it appeared that the surface of the river bottom at the site of the proposed dam, and for a considerable distance north and south, appeared to one making an inspection, by merely gazing at it, to be ledge, and that the banks of the river at said site, for a considerable distance north and south, the east bank, and the country for some distance west of the west bank, showed ledge

formation that frequently came to the surface; that neither party, before executing the contract evidenced by said exhibits, ever made any borings or other endeavor to ascertain the quality of the river bottom or any part of the site of the proposed dam, * * * except to stand on the bank of the river in that vicinity and discover what could be seen there by mere inspection, and except that, before the execution of the contract, George Badger informed plaintiffs of the soundings made through the ice March 9, 1906, and surface levels taken, as hereinafter stated, and that those were indicated on the profile line; that plaintiffs began the work of constructing the dam shortly before July 2, 1906, and during the progress of that work, which was begun from the west side, it was discovered that the ledge apparently forming the river bottom dipped at a point a little west of the center of the stream, forming the large fissure or pocket here in question; that this pocket was full of a substance unsuitable for the foundation of a dam, which required excavation and filling with concrete masonry in order to construct a suitable dam for the purpose required by the defendant, whereupon plaintiffs excavated the pocket and filled it with such masonry, for which they charged defendant $17,118.05. * * *

It also appeared from plaintiffs' evidence as to the facts above recited that, when the dam was finished, or considered by them to be finished, the plaintiffs' foreman and the inspector, Mr. Slayton, and all the members of the commission, except Judge Powers, went to the headgates and the water was let into the penstock, and immediately afterwards the machinery of defendant's plant was connected and ever thereafter continued in operation; that lines of wire have been connected with the power house, and the same have been used by defendant for municipal lighting, etc., and for commercial purposes, without cessation. * * *

It appeared that on March 9, 1906, Engineer McIntosh, Mr. Slayton, George Badger, and his son Fred Badger, were down on the ice of the river at the place represented on the fourth page of Exhibit B, as "top of ice March 9, 1906"; that soundings were then made there by McIntosh, by putting down, through holes made in the ice, a pole having a steel or iron tip, to ascertain the character of the bottom of the river, and each time when he put the sounding rod down he made notes in a notebook of what he found; that McIntosh and Slayton were there under the employment of the defendant, but George Badger and his son were mere volunteers, representing no one, though all took part in the soundings made; that, from the soundings then made, George Badger supposed the stream had rock bottom at every place where the soundings were made, all the way across. The notations made in the book by McIntosh were that, at elevation 79.1, the bottom was rock or boulder; at elevation 76.0, the bottom was rock or boulder; at elevation 75.3, the bottom was gravel; at elevation 74.7, the bottom was rock or boulder; at elevation 75.1, the bottom was gravel; at elevation 76.2, the bottom was gravel; and at elevation 77.1 (the place of the last sounding), the bottom was gravel. The defendant's evidence showed that the profile on the fourth page of Exhibit B was made by

McIntosh from the soundings and measurements taken that day. The testimony of Slayton, as to the character of the river bottom, shown by the soundings, agreed with the notations made in the notebook. It appears that, before the plaintiffs executed the written contract, they were told by George Badger, then and ever since in their employ, of the aforementioned soundings, and given an account of what was found. It further appeared that after the plans and specifications were prepared, and before plaintiffs had made their bid, plaintiff Varnum met all the commissioners (except, perhaps, Judge Powers) at the office of Commissioner Stafford in Morrisville, and by them was there shown the plans, Exhibit B, and also the notes made by McIntosh at the time of making the soundings as above stated. * * *

Plaintiffs' evidence tended to show that, at the above-mentioned interview with the commissioners, the condition of the ground and material of the surface for the dam site was spoken of, and Varnum was told that it was rock foundation, first-class site for a dam. * * *

All the evidence in the case tending to show that at the time of the execution of the contract and afterwards, as the work progressed, the commissioners understood that by the terms of the contract the foundation of the dam was to be constructed substantially on the bed of the river shown by the lines and levels on Exhibit B, fourth page, as claimed by the plaintiffs, also had a bearing on the question of whether the commissioners waived the provision of the specifications requiring that extra work found necessary to perform must be covered by an order in writing by the owners or their representatives, to entitle the contractors to an allowance or payment for such work performed, or material furnished. If the commissioners understood that the foundation of the dam was, by the terms of the contract, to be constructed substantially on the bed of the river, as claimed by the plaintiffs, then they must have known that the work of excavating the pocket and filling the same, a work of such magnitude and expense, found necessary to perform, was not covered by the specifications and the contract, and they must have further known that this work was not covered by any order in writing by the owners or their representatives, but was covered by a verbal order given by the inspector under their direction or acquiescence. The evidence further tended to show that, having such knowledge, the commissioners, during this work of excavating and filling the pocket, made no objection thereto, and subsequently accepted the benefits thereof. In discussing the sufficiency of the pleadings when this case was here before (84 Vt. 302, 79 A. 391) we said:

"And when, by its inspector, it (defendant) stood by day after day and saw the work go on without objection, and was content to let it continue until finally completed, knowing that no such order (in writing) had been given, and also knowing, as it must have known, that the plaintiffs were expecting extra compensation therefor, and then receiving and accepting the completed structure without objection, and ever since using the same as its own, it must be taken to have waived its right in respect of such an order."

The plaintiffs' evidence tended to show nearly a dozen instances, other than that of excavating and filling the pocket, when they performed work and furnished materials not covered by the specifications and the contract, under verbal directions by the inspector, concerning which no claim was made that they were not so directed, nor that they were not extras, and that sometimes, when such directions were given, some of the commissioners were present and heard them given, and sometimes they were not; that the extra work done and materials furnished in more or less of these instances were estimated by the engineer, as extras, during the progress of the work under the written contract, and, as to four of the instances, the amounts charged were conceded to be correct, the only defense being that they were not covered by an order in writing. Yet the record shows no instance of extras being covered by such an order.

A waiver may be inferred from an order to perform extra work under such circumstances as imported a promise to pay therefor. Bartlett v. Stanchfield, 148 Mass. 394, 19 N. E. 549, 2 L. R. A. 625. It has been held that where the owner requested the contractor, without writing, to furnish a large number of items of work and materials, and the same were furnished by the contractor and accepted by the owner, and part of them were paid for, a provision in the contract that the contractor would make no charge for extra work unless ordered in writing by the owner or its engineer was waived. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co., 132 F. 957, 66 C. C. A. 67; McGrath Constr. Co. v. Waupaca-Green Bay R. Co., 148 Wis. 372, 134 N. W. 824; Schmulbach v. Caldwell, 196 F. 16, 115 C. C. A. 650; O'Keefe v. St. Francis' Church, 59 Conn. 551, 22 A. 325. In Davis v. La Crosse Hospital Ass'n, 121 Wis. 579, 99 N. W. 351, 1 Ann. Cas. 950, it was said:

"If, under a contract containing such a provision, a builder were requested to and did perform extra work of such magnitude that the idea that it was intended he should have no additional pay therefor would appear highly unreasonable or absurd, a court might, nothing appearing to the contrary, conclude that there was a mutual intention to waive such provision."

The fact that, throughout the performance of the work called for by the written contract, the commissioners entirely disregarded the stipulation therein as to the form of the orders for extra work or materials, the order given in every instance being verbal, taken with the other evidence bearing upon the question, was sufficient to justify a finding of a general waiver, an intentional relinquishment altogether, by the commissioners, of the provision requiring orders for such work and materials to be in writing. Meyer v. Berlandi, 53 Minn. 59, 54 N. W. 937. * * *

The question of waiver was one of fact for the jury to determine. Findeisen v. Metropole Fire Ins. Co., 57 Vt. 520. The effect of such a waiver, if established, was to strike out the two words "in writing," leaving the wording of the rest of the contract unchanged and in force (Young v. Jeffreys, 20 N. C. 357; O'Loughlin v. Poli, 82 Conn. 427,

74 A. 763), and then any form of order by the owners or their representatives was sufficient, and any extra work found necessary to perform, covered by an order (verbal or otherwise) from the proper source, in the language of the specifications, "will be paid for at actual cost, plus 10 per cent." With the said two words "in writing" thus eliminated, the provisions of the second clause under the same heading, "Extra Work," in the specifications, are none the less applicable; for then, as before, the last two words therein "such order," have reference to the kind of order required by the first clause. In such circumstances, the provision that the extra work "will be paid for at actual cost, plus 10 per cent.," constitutes an express promise to pay therefor, and fixes the manner of arriving at the amount. Consequently no occasion arises for discussing the question of an implied promise. * * *

The ground presented by subdivision "d" was the failure to complete the work within the time specified in the contract. Yet this does not defeat the plaintiffs' right of recovery; for the defendant allowed the work to go on after the expiration of the time limited the same as before, with its inspector in charge, thereby treating the contract as still in force. This was a waiver of strict performance as to time, and, although in the circumstances of this case the defendant may or may not be entitled to a reduction for damages suffered by reason of the delay, it cannot by this technical objection defeat the action. Smith v. Smith, 45 Vt. 433; Foster v. Worthington, 58 Vt. 65, 4 A. 565.

The motion for a directed verdict was properly overruled. * * *[10]

McKENNA v. VERNON.

Supreme Court of Pennsylvania, 1917. 258 Pa. 18, 101 A. 919.

STEWART, J. This was an action to recover a balance alleged to be due on a building contract. By written agreement under date of January 20, 1914, the plaintiff undertook the erection and completion of a moving picture theater at 1526–28 Cumberland street in the city of Philadelphia, agreeably to certain plans and specifications which accompanied and were made part of the agreement, he to receive therefor, in full compensation, the sum of $7,750, to be paid by the owner to the contractor wholly upon certificates of the architect as follows: Eighty per cent. of the work set in place as the work proceeds, the first payment within 30 days after the completion of the work; all payments to be due when certificates of the same shall have been issued by the architect; the building to be completed by April 20, 1914, and the work to be done under the direction of the architect. A supplemental agreement was entered into by the parties March 24, 1914, which provided for an enlargement of the theater building, for which the contractor was to receive an additional $1,000. The main provisions of this agreement were similar to those contained in the earlier. By the

[10] The dissenting opinion of Taylor, J., in which Munson, C. J., concurs, is omitted.

later agreement the work was to be completed on or before the 11th of May, 1914. From time to time, as the work progressed, the owner made several payments on account, amounting in all to $6,000. Suit was brought, August 28, 1914, to recover the balance of $2,750, with interest from June 30, 1914. Defense was made on several grounds: Failure of contractor to erect and complete the building in accordance with the plans and specifications, the substituting of inferior and cheaper materials, and inferior workmanship throughout, entailing, for the supply and correction of the same, if attempted, a large expenditure. Further, defendant claimed that the building was not completed within the time allowed by the contract, and demanded as a set-off a penalty of $283.35. The trial resulted in a verdict for the plaintiff for $2,500. At the conclusion of the evidence, the defendant asked for a compulsory nonsuit, which was refused.

The several assignments of error, in one form and another, relate directly or indirectly to this one feature of the case, and are all based on the theory that, in the absence of a certificate from the architect of the final completion of the building in accordance with plans and specifications, no right of action existed. Not only is there no express provision to this effect in the contract, but the contract itself shows that no distinction is there made between final payment and the payments on account of the 80 per cent. of work in place. All payments were to be made only on certificate of the architect, and yet with a single exception each of the seven payments made as the work progressed was made without a certificate being asked for. With such constant and repeated disregard on the part of the owner to exact compliance with this provision in the contract, it is too late now for him to insist that failure on the part of the plaintiff to secure such certificate before suit defeats his right of action. Furthermore, on the trial, the architect, called as a witness, testified that the plaintiff had performed substantial compliance with all the requirements of the contract, that he had not given the certificate to this effect only because it had not been asked for, and that whatever variations there were from the specifications were authorized and directed by him. The provision in the contract for written certificates from the architect is for the benefit and protection of the owner. If he waived it repeatedly, as he did here, during the progress of the work, he cannot complain if he be held to have waived it when he seeks to defend against a final payment for work shown to have been honestly and substantially performed, especially when almost daily he has had the work under his own observation, without remonstrance or complaint at any time with respect to either the work done or materials employed. This being the situation, the court was entirely right in refusing the nonsuit. * * *[11]

[11] The subject of waiver is of the utmost practical importance, particularly in connection with construction contracts. Breaches of conditions precedent are frequently waived by the action of the aggrieved party in continuing with the contract as though it were still in force; that is, a breach of condition which would discharge the other party if at once treated by him as a discharge, will not have this effect if he goes on with the contract instead of repudiating

SECTION 5.—IMPOSSIBILITY AS EXCUSE FOR NON-PERFORMANCE

1. In General

Impossibility of performance which is obvious upon the face of the contract, or which arises from nonexistence of the subject-matter, affects the formation of the contract; and here there is of course no question of discharge, but merely of avoidance.

The situation which we have now under consideration is that in which a valid contract has been made but has become impossible of performance because of facts arising subsequent to its formation. The general rule is that impossibility is no excuse. If the thing contracted for is possible in itself, and the contractor has failed to condition his liability expressly, there can be no excuse on the ground of subsequent impossibility, because he might have provided for the contingency in his contract.

So wherever a contract for the erection of a structure is entire, that is, where the builder has unconditionally agreed to produce the completed result, the destruction of the building by any cause before completion will not excuse the contractor. On the other hand, if the contractor has expressly conditioned his liability to perform by a clause in the contract excusing him in case of fire, flood, or other accidental destruction, then the occurrence of the event will release him from further liability under the contract.

STEES et al. v. LEONARD.

Supreme Court of Minnesota, 1874. 20 Minn. 494 (Gil. 448).

The defendants, who are architects and builders, having at plaintiffs' request, furnished them with plans and specifications for a building proposed to be erected by them on their own land, afterwards, and on the 18th August, 1868, the plaintiffs and defendants made and executed a contract under seal, in which they are all described as "of the city of St. Paul," etc. By the terms of the contract, the defendants "agree to and with the said John A. and Washington M. Stees, to well and truly build, erect, and complete the three-story business house proposed to be erected by the said J. A. & W. M. Stees, on Minnesota street, between Third and Fourth streets; all in accordance with the plans and specifications of the same, with such alterations as are mentioned in said

it; in such case he can only recover his damages. Conditions of architect's certificates, written orders for extra work, time of performance, are those most frequently waived, either expressly, or as in the above cases, impliedly by action or conduct.

specifications, prepared by M. Sheire & Bro., architects, and signed by both parties; the building, with the exception of painting, to be completed on or before the 1st day of January, 1869. * * *

The defendants entered upon the performance of the contract and erected the proposed building to a height of three stories, when it fell to the ground, on the 1st November, 1868. In the following year the defendants again attempted to perform the contract, and again erected the building to the same height as before, when it again fell, on the 1st August, 1869, whereupon the defendants abandoned the work, and refused to perform the contract. [The plaintiffs then brought this action and demanded judgment.] * * * for the sum of $5,214.80, with interest, as the damages sustained by the plaintiffs; being $3,745.80 paid, pursuant to the contract, during the progress of the work, $1,000 as damages for loss of the use of the lot on which the building was to be erected, and $469, as damages occasioned by the fall of the building, to an adjacent house of plaintiffs and property stored therein. * * *

At the trial in the district court for Ramsey county, the defendants made the following offers of proof: * * *

That in architecture and building, "footings," when used in a building, are the lowest portion of the structure, and the only artificial foundation employed for the building, when footings are employed.

That they constructed each of these buildings that fell, in all respects as required by the contract and specifications.

The evidence thus offered * * * was objected to as incompetent, irrelevant, and immaterial, and in each case the objections were sustained, and the defendants excepted.

The jury found for the plaintiffs. The defendants moved, upon a bill of exceptions, for a new trial, and appeal from the order denying their motion.

YOUNG, J. The general principle of law which underlies this case is well established. If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified liability. The law does no more than enforce the contract as the parties themselves have made it. Many cases illustrating the application of the doctrine to every variety of contract, are collected in the note to Cutter v. Powell, 2 Smith Lead. Cas. 1. * * *

The rule has been applied in several recent cases, closely analogous to the present in their leading facts. In Adams v. Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137, the defendant Nichols contracted to erect a dwelling-house for plaintiff on plaintiff's land. The house was nearly completed when it was destroyed by accidental fire. It was held that the casualty did not relieve the contractor from his obligation to

perform the contract he had deliberately entered into. The court clearly state and illustrate the rule, as laid down in the note to Walton v. Waterhouse, 2 Wms. Saunders, 422, and add: "In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there be any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to relieve persons from the improvidence of their own acts."

In School Dist. No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371, the defendant contracted to build and complete a schoolhouse. When nearly finished, the building was struck by lightning, and consumed by the consequent fire, and the defendant refused to rebuild, although plaintiffs offered to allow him such further time as should be necessary. It was held that this nonperformance was not excused by the destruction of the building. The court thus state the rule: "If a person promise absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done, or the event, is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful."

Superintendent, etc., of Public Schools of City of Trenton v. Bennett, 28 N. J. Law (3 Dutcher) 513, 72 Am. Dec. 373, is almost identical in its material facts with the present case. The contractors agreed to build and complete a schoolhouse, and find all materials therefor, according to specifications annexed to the contract; the building to be located on a lot owned by plaintiff, and designated in the contract. When the building was nearly completed it was blown down by a sudden and violent gale of wind. The contractors again began to erect the building, when it fell, solely on account of the soil on which it stood having become soft and miry, and unable to sustain the weight of the building; although, when the foundations were laid, the soil was so hard as to be penetrated with difficulty by a pickaxe, and its defects were latent. The plaintiff had a verdict for the amount of the instalments paid under the contract as the work progressed. The verdict was sustained by the Supreme Court, which held that the loss, although arising solely from a latent defect in the soil, and not from a faulty construction of the building, must fall on the contractor.

In the opinion of the court, the question is fully examined, many cases are cited, and the rule is stated, "that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. * * * If before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder; he must rebuild. The thing may be done, and he has contracted to do it. * * * No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his

contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather, the law leaves it where the agreement of the parties has put it. * * * Neither the destruction of the incomplete building by a tornado, nor its falling by a latent softness of the soil, which rendered the foundation insecure, necessarily prevented the performance of the contract to build, erect, and complete this building for the specified price. It can still be done, for aught that was opened to the jury as a defence, and overruled by the court."

In Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762, the foundation of the building sank, owing to a latent defect in the soil, and the owner was compelled to take down and rebuild a portion of the work. The contractor having sued for his pay, it was held that the owner might recoup the damages sustained by his deviation from the contract. The court refer with approval to the cases cited, and say: "The principle which controlled them rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires a party to do what he has agreed to do. If unexpected impediments lie in the way, and a loss ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

Nothing can be added to the clear and cogent arguments we have quoted. * * * It is no defence to the action, that the specifications directed that "footings" should be used as the foundation of the building, and that the defendants, in the construction of these footings, as well as in all other particulars, conformed to the specifications. The defendants contracted to "erect and complete the building." Whatever was necessary to be done in order to complete the building, they were bound by the contract to do. If the building could not be completed without other or stronger foundations than the footings specified, they were bound to furnish such other foundations. If the building could not be erected without draining the land, then they must drain the land, "because they have agreed to do everything necessary to erect and complete the building." (3 Dutcher, 520; and see Dermott v. Jones, supra, where the same point was made by the contractor, but ruled against him by the court.)

As the draining of the land was, in fact, necessary to the erection and completion of the building, it was a thing to be done, under the contract, by the defendants. * * *

There was, therefore, no error in the exclusion of the evidence offered, and the order appealed from is affirmed.

2. Exceptions to the General Rule

(1) Impossibility Because of Change in Law

MOORE & TIERNEY, Inc., v. ROXFORD KNITTING CO.

District Court of the United States, N. D. New York, 1918. 250 F. 278.[12]

Ray, District Judge. At the time war was declared between the United States of America and the Imperial Government of Germany the plaintiff, engaged in manufacturing knit underwear, had a valid contract or contracts with the defendant, by the terms of which it was obligated to make and deliver to defendant, certain quantities of woolen knit undershirts and drawers at agreed prices and at or within specified times. These contracts came into existence by way of accepted orders, which were subject to delays or nondelivery by strikes, accidents, or for any reason beyond the control of plaintiff. It was then engaged in the performance of such contracts, and intended in good faith to perform, but was prevented by the performance of certain government orders. The plaintiff is one of several manufacturers of such goods located at Cohoes, N. Y. Deliveries aggregating $14,090.08 were made and not paid for, and considerable quantities were not delivered. Defendant alleges $20,000 damages for nonperformance or alleged breach of contract.

May 22, 1917, one A. Frey, who was a member of a committee of the Advisory Board of National Defense, wrote each of these manufacturers at Cohoes, N. Y., including the plaintiff, informing them that the United States government was in need of and desirous of obtaining knit undershirts and drawers, inquiring as to the capacity of the mills of the manufacturers and the quantities they could furnish. * * *

July 2, 1917, Mr. Cromwell, signing as chairman, etc., wrote the plaintiff and the other manufacturers of knit goods mentioned as to the urgent wants and needs of the United States Navy Department for knit undershirts and drawers, and amongst other things wrote:

"The Knit Goods Committee [of the Council of National Defense] has received an emergency call for the Navy Department," etc.; and also, "It is absolutely necessary that this underwear should be obtained;" and also, "This underwear can be made by only a limited number of mills in the country. We have carefully apportioned it among the different mills, and know that we cannot secure the quantity needed unless we can receive from you 25,000 shirts and 25,000 drawers by October 1st and the same quantity additional by December 1st." * * *

To fill this order or contract with the Navy Department, and also the orders or contracts with the War Department, demanded and required the total capacity and output of the plaintiff's mill while filling same, and plaintiff was unable, if it filled the government orders or

[12] Statement of facts is omitted.

contracts, to make further deliveries to defendant under its contract with it at the times agreed, and defendant was so advised, whereupon it in substance and effect canceled the contract, refused to pay for the goods delivered, and claims damages for nonperformance. Two other contracts or orders were placed with the plaintiff by the government, one November 16, and one December 12, 1917, and from the acts of the parties and the correspondence it cannot be doubted that it was understood the plaintiff in accepting the work, was acting under the orders and demands of the government. The plaintiff does not contend that these government requirements released it from the contract with defendant and obligation to perform it, except in so far as it postponed performance on its part and gave preference to this government work. The defendant claims these were not orders under or within the meaning of the acts of Congress referred to, and that it was justified in acting as it did, and may counterclaim its damages.

If before or after war was declared a party, A., entered into a contract with another party, B., to make and deliver to him goods, wares, and merchandise, stores and supplies such as the government requires for army or navy use, or both, and after the passage of the acts of Congress—Public No. 85, 64th Congress, approved June 3, 1916, "An act for making further and more effectual provision for the national defense, and for other purposes," and Public No. 391, 64th Congress, approved March 4, 1917, "An act making appropriation for the naval service for the fiscal year ending June 30th, 1918, and other purposes" —the United States government, being at war, came in and ordered or directed such party, A., to make goods, wares, and merchandise of the nature and kind referred to for it, and compliance with such order and requirement of the government demanded or required the entire output of the factory of such party thereafter, all it could reasonably produce, it was the duty of such party to comply with such government order or requirement, and if compliance therewith made it impossible for such party to fill or comply with or perform its contract with such other party, B., according to its terms and within the time specified, and such other party, on being notified of the inability to so perform, declared the contract ended, he cannot recover damages for nonperformance by A. * * *

In such case or cases it is clear that, under the provision of the acts of Congress referred to, performance by A. within the time required by the contract was made impossible by the act and requirements of the United States government. But if party A., thinking it more profitable or patriotic to work for the government than in the performance of its existing contract with B., voluntarily sought a contract with the government and offered its services for compensation in the manufacture of such goods as the government required, and voluntarily entered into such a contract sought by it with the United States, the performance of which demanded and required its entire output, all it reasonably could produce, and party A. thereupon voluntarily declined or refused to proceed further in the performance of his contract with party B., he is not excused, and party B. may recover or offset and counterclaim his dam-

ages, if any. In such case performance by A. is not prevented by the act of God, or vis major. Nonperformance is the result of his voluntary act or acts, not that of the government, and he acts under no compulsion whatever.

But section 120 of the National Defense Act, referred to, authorizes the President, through the head of any department, in addition to the present authorized methods of purchase or procurement, the methods before in use, to "place an order" with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature or kind usually produced or capable of being produced by such individual, firm, or corporation, and then further provides that, when such an order is placed, "compliance with all such orders for products or material shall be obligatory," and "shall take precedence over all other orders and contracts theretofore placed with such individual, firm, or corporation." Refusal to comply is made a crime, and severe punishments may be inflicted, etc. * * *

The correspondence in evidence and the testimony of Paymaster Hancock shows that the plaintiff and the other manufacturers referred to were acting with and pursuant to the direction of these committees or councils appointed by the United States authorities and those of Mr. Cromwell, also acting for the Paymaster of the Navy. * * *

I do not doubt that Congress had power to place these burdens on the manufacturers, and on those with whom they had contracted or with whom they should contract. The war power is paramount, arises from necessity, and no government can endure without its exercise on occasion. * * *

[I therefore conclude, that since defendant's performance of its contract with plaintiff was rendered impossible because of change in law, the said performance is excused, and therefore plaintiff can have no cause of action for the breach.]

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(2) Impossibility Because of Destruction of the Subject-Matter

Where the continued existence of a specific thing is essential to the performance of the contract, its destruction from no fault of either party operates as a discharge. It is upon the theory of this exception that the distinction is made between contracts to build a structure, and contracts for repair. As to the latter, even though the repairs be only partly performed at the time the house burns, there may be a recovery upon the contract for the pro rata price; for the destruction of the building operates as a discharge or excuse for the failure to complete said repairs, on the ground of impossibility. On the other hand, where the contract is to construct a building, destruction of the uncompleted building will not excuse the contractor; he must rebuild and complete his contract before he can recover the price or any part thereof.

BUTTERFIELD v. BYRON.

Supreme Judicial Court of Massachusetts, 1891. 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654.[13]

KNOWLTON, J. It is well established law that where one contracts to furnish labor and materials, and construct a chattel, or build a house, on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building without his fault before the time fixed for the delivery of it. Adams v. Nichols, 19 Pick. 275; Wells v. Calnan, 107 Mass. 514. * * * It is equally well settled that where work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other. Taylor v. Caldwell, 3 Best & S. 826; Lord v. Wheeler, 1 Gray, 282; * * * Walker v. Tucker, 70 Ill. 527. In such cases, from the very nature of the agreements as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, what is the true interpretation of the contract? Was the house, while in the process of erection, to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for, even if he should be obliged repeatedly to begin anew on account of the destruction again and again of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, brick-work, painting, and plumbing were to be done by the plaintiff. Immediately before the fire, when the house was nearly com-

[13] Statement of facts is omitted.

pleted, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. * * *

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(3) Impossibility Because of Sickness or Death, in Personal Service Contracts

The death or incapacitating illness of the promisor in a personal service contract will operate as a discharge on the ground of impossibility, for in such contracts the law reads in an implied condition that the promisor be physically able to perform. This exception has been extended to circumstances such as are illustrated in the following case, where there is even no sickness and no more than a reasonable danger of such.

LAKEMAN v. POLLARD et al.

Supreme Judicial Court of Maine, 1857. 43 Me. 463, 69 Am. Dec. 77.[14]

HATHAWAY, J. The plaintiff labored for the defendants at their mills in St. Johns, and by this action claims to recover his wages.

The defense is, that the labor was performed under a contract, on his part, to work for the defendants during the sawing season of 1854, which he did not fulfill. [It was proved that the said sawing season commenced May 1st and ended the last day of November, and that plaintiff left July 29th or 30th.]

The plaintiff contends that he was excused from the performance of his contract, and justified in quitting when he did, by reason of the alarm and danger occasioned by the prevalence of the cholera in the vicinity of the mills, and that he is entitled to a reasonable compensation for the labor performed. If the fulfillment of the plaintiff's contract became impossible by the act of God, the obligation to perform it was discharged. If he was prevented by sickness or similar inability he may recover for what he did, on a quantum meruit. 1 Parsons on Contracts, 524.

The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its

[14] Statement of facts is omitted.

character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it, nor does it make any difference that the men who remained there at work after the plaintiff left were healthy, and continued to be so. * * *

[The question as to whether a man of ordinary prudence would have been justified in leaving at the time the plaintiff did, under all the circumstances, was properly a question of fact for the jury; and the affirmative finding on this question entitles the plaintiff to a judgment. Defendant's motion for a new trial was properly overruled.] [15]

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(4) Impossibility Because Conditions Essential to Performance Do not Exist

KINZER CONST. CO. v. STATE.

Court of Claims of New York, 1910. 125 N. Y. S. 46.

RODENBECK, J. The claimant made a contract with the state of New York to construct 3.76 miles of the improved Champlain Canal which is a part of the so-called Barge Canal system of the state now in progress of construction; and while the work was in progress, and claimant was excavating for one of the locks, an extensive cave-in occurred, which revealed the fact that for the balance of the contract the earth was of a "slippery, greasy clay," with not sufficient resistency to permit of the construction according to the contract, plans, and specifications of the lock and substantially the remainder of the work. The state issued a stop order while it was investigating and determining what to do under these unexpected conditions, and this order remained in force for six months, when an alteration order which involved extensive changes in the construction of the remainder of the work, was submitted by the state to the claimant for the completion of the contract. The claimant refused to accept these alterations, insisting that they constituted a fundamental change in the contract and amount to a breach of the contract by the state, and thereupon the state proceeded to advertise for bids for the completion of the work, and let it to other contractors, and the claimant filed this claim for the work done and not paid for, and for damages including loss of profits on the portion of the work uncompleted, amounting, in all, to $370,525.41. The total amount of the contract, including previous alteration orders, was $968,296.11, and there was uncompleted at the time that the stop order was issued $521,954.42, and of this amount $398,612 was eliminated and new work was added, aggregating $153,584.50, so that the work to be done there was a reduction of $245,027.50, or a decrease of about 25 per cent. of the contract price, and upon these facts, and upon the terms of its contract, the claimant insists that the state violated its contract and justified its course in refusing to complete the contract; while the state claims that

[15] The concurring opinion of May, J., is omitted.

the construction of the work when the cave-in occurred revealed the fact that the subsoil was so treacherous that the lock could not be constructed in that section of claimant's contract at all, and made necessary the other changes in the plans and specifications, and also that the alterations were authorized by the contract, and that claimant was guilty of a breach of its contract in refusing to complete it as directed by the alteration order. * * *

When the excavation for the foundation of the lock had been carried to a depth of 10 or 12 feet, it was found that the underlying stratum was a greasy, slippery clay with no grit in it—"just like axle grease"—as one witness put it. Claimant's expert said that he had never seen any soil like it, and that it would not be good engineering to build a lock in such material at all. Under this condition of things, the case falls within that line of decisions where the contract is regarded as at an end and performance is excused because of the failure of conditions the existence of which are necessary to the performance of the contract. The early rule upon impossibility as an excuse for the performance of a contract was that inability to execute an absolute executory contract due to subsequent unforeseen accident or misfortune without the fault of either party will not excuse performance. Paradine v. Jane, Aleyn, 26. This rule which was promulgated in English Jurisprudence as early as the year 1178 was based upon the ground as stated in this case that: "Where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." * * *

In England the rule prevailed in all its severity down to the middle of the last century (Hall v. Wright, E. B. & E. [1857]), but since then the courts both here and in England have modified it to a large extent upon the theory that the event which rendered the performance impossible should be implied as a matter of law as one of the conditions of the contract (Taylor v. Caldwell, 3 B. & S. 8249, [1863]; Bailey v. De Crespigny, L. R. 4 Q. B. 185), thus carrying out the supposed intention of the parties. * * *

These exceptions have been growing so that now there are at least four well-recognized modifications of the early rule, while the courts seem to be groping for a rule broad enough to include all of the exceptions. Three of these exceptions have long since been firmly established in the jurisprudence, not only of this country, but of England, and the fourth has been adopted in many cases of recent date in this state where the existing rules did not equitably meet the peculiar facts. The rule that performance is excused where legal impossibility arises from a change in the law or where the specific thing which is essential to performance is destroyed, or where there is an incapacity by sickness or death in the case of a contract for personal services, are of long standing, but quite recently a fourth and broader rule has grown up which is applicable to the case at bar. * * *

In Lorillard v. Clyde, 142 N. Y. 456, 462, 37 N. E. 489, 491 (24 L. R. A. 113), the defendant was relieved from paying dividends, which he

had agreed to do, because the corporation out of whose earnings they were to come had been involuntarily dissolved. Chief Judge Andrews says in his opinion: "* * * The contract in question was not with the corporation whose life was extinguished by the judgment of dissolution. But the guaranty assumed that the corporation would continue in existence during the seven-year period. The liability which the defendants assumed was in consideration of the benefits which might accrue to them from the management of the transportation business of the corporation during that period. Upon the assumption that the death of the corporation was brought about without their fault, were they thereafter bound? Is the doctrine of implied condition less applicable than it would be if the contract had been between the defendants and the corporation? If in the one case the contract, so far as it was unexecuted, would be terminated, did not the happening of the same event terminate the engagement of these parties, based on the assumed continuance of the corporation in life?" * * *

In Buffalo & Lancaster Land Co. v. Bellevue L. & I. Co., 165 N. Y. 247, 254, 59 N. E. 5, 7, 51 L. R. A. 951, the plaintiff failed to secure relief for an alleged breach of a contract for the construction of an electric road under which the defendant had agreed to operate cars certain hours each day, and was prevented from doing so on certain days in the winter by storms of unusual severity. * * *

In Whipple v. Lyons Beet Sugar Refining Co., 64 Misc. Rep. 363, 365, 118 N. Y. S. 338, 340, the impossibility of performance arose from drought and other climatic conditions which prevented the defendant from carrying out a contract to grow a certain number of acres of beets for a sugar company according to certain printed instructions. * * *

From these cases it will be seen that a fourth exception must be made to the general rule that accident or an unforeseen contingency arising without the fault of either party will not excuse performance of an absolute executory contract, and the four exceptions may now be stated broadly as follows: First, where the legal impossibility arises from a change in the law; * * * second, where the specific thing which is essential to the performance of the contract is destroyed; * * * third, where by sickness or death personal services become impossible; * * * and, fourth, where conditions essential to performance do not exist. * * * From these considerations the rule may be deduced fairly in the present case that where in the course of the construction of a canal natural conditions of soil unexpectedly appear which contingency the contract does not in express terms cover, and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract and substantially affect the work remaining under the contract, the law will read into the contract an implied condition when it was made that such a contingency will terminate the entire contract. * * *

In the eyes of the law being a part of the terms of the contract, the conditions that rendered performance impossible do not terminate the contract ab initio, and vitiate what has been done and what remains to be done that is capable of execution. The conditions may be of such

an extent as to amount to a substantial abrogation of the entire contract, or they may relate to an insignificant part of the contract, but they excuse performance only to the extent to which performance is impossible, and leave what has been done valid, permitting a recovery therefor, and may not excuse performance of the remaining work. No general rule can be laid down which will apply to all cases, but each case must be decided upon its own facts, and that this course can be taken and justice done according to the facts in each case unhampered by written rules is due to the great flexibility of the common law, which is its chief merit.

Applying this rule to the case at bar, it will be seen to work out an equitable result. The state was not in a position to compel performance of an impossibility, and likewise the claimant could not ask the state to proceed with the contract. It would not have been fair of the state to insist upon the literal performance of its contract, and place the loss upon the claimant for the failure to perform, nor would it have been just for the claimant to insist that the state must carry out its contract as planned or suffer the penalty of paying damages, including prospective profits for the breach of the contract. It is better to regard the contract as at an end, and treat both parties as having been excused from further performance, allowing the claimant to recover for work done and for benefits received by the state under the contract down to the time of the discovery of the conditions which rendered performance impossible, and for such damages as may have resulted to it from the stop order issued by the state. * * * The state, therefore, had the right to relet the completion of the work, but must bear the increased expense resulting therefrom, while the claimant is not entitled to recover for any prospective profits on the work remaining to be done. * * *

The claimant should have judgment for $70,679.25, with interest on $61,144.16 from December 15, 1908.

Judgment entered accordingly.

MINERAL PARK LAND CO. v. HOWARD et al.

Supreme Court of California, 1916. 172 Cal. 289, 156 P. 458, L. R. A. 1916F, 1.

[Action by the Mineral Park Land Company against P. A. and C. H. Howard. Judgment for plaintiff, and defendants appeal. Modified and affirmed.]

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff for $3,650. The appeal is on the judgment roll alone.

The plaintiff was the owner of certain land in the ravine or wash known as the Arroyo Seco, in South Pasadena, Los Angeles county. The defendants had made a contract with the public authorities for the construction of a concrete bridge across the Arroyo Seco. In August, 1911, the parties to this action entered into a written agreement whereby the plaintiff granted to the defendants the right to haul gravel

and earth from plaintiff's land, the defendants agreeing to take therefrom all of the gravel and earth necessary in the construction of the fill and cement work on the proposed bridge, the required amount being estimated at approximately 114,000 cubic yards. Defendants agreed to pay 5 cents per cubic yard for the first 80,000 yards, the next 10,000 yards were to be given free of charge, and the balance was to be paid for at the rate of 5 cents per cubic yard.

The complaint was in two counts. The first alleged that the defendants had taken 50,131 cubic yards of earth and gravel, thereby becoming indebted to plaintiff in the sum of $2,506.55, of which only $900 had been paid, leaving a balance of $1,606.55 due. The findings support plaintiff's claim in this regard, and there is no question of the propriety of so much of the judgment as responds to the first count.

The second count sought to recover damages for the defendants' failure to take from plaintiff's land any more than the 50,131 yards. * * *

The court found that the plaintiff's land contained earth and gravel far in excess of 101,000 cubic yards of earth and gravel, but that only 50,131 cubic yards, the amount actually taken by the defendants, was above the water level. No greater quantity could have been taken "by ordinary means," or except by the use, at great expense, of a steam dredger, and the earth and gravel so taken could not have been used without first having been dried at great expense and delay. On the issue raised by the plea of defendants that they took all the earth and gravel that was available the court qualified its findings in this way: It found that the defendants did take all of the available earth and gravel from plaintiff's premises, in this, that they took and removed "all that could have been taken advantageously to defendants, or all that was practical to take and remove from a financial standpoint"; that any greater amount could have been taken only at a prohibitive cost, that is, at an expense of 10 or 12 times as much as the usual cost per yard. It is also declared that the word "available" is used in the findings to mean capable of being taken and used advantageously. It was not "advantageous or practical" to have taken more material from plaintiff's land, but it was not impossible. There is a finding that the parties were not under any mutual misunderstanding regarding the amount of available gravel, but that the contract was entered into without any calculation on the part of either of the parties with reference to the amount of available earth and gravel on the premises.

The single question is whether the facts thus found justified the defendants in their failure to take from the plaintiff's land all of the earth and gravel required. This question was answered in the negative by the court below. The case was apparently thought to be governed by the principle—established by a multitude of authorities—that where a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by difficulty of performance, or by the fact that he becomes unable to perform. 1 Beach on Contracts, § 217. * * *

It is, however, equally well settled that, where performance depends

upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent. 1 Beach on Contracts, § 217; 9 Cyc. 631. Thus, where the defendants had agreed to pasture not less than 3,000 cattle on plaintiff's land, paying therefor $1 for each and every head so pastured, and it developed that the land did not furnish feed for more than 717 head, the number actually put on the land by defendant, it was held that plaintiff could not recover the stipulated sum for the difference between the cattle pastured and the minimum of 3,000 agreed to be pastured. Williams v. Miller, 68 Cal. 291, 9 P. 166. Similarly, in Brick Co. v. Pond, 38 Ohio St. 65, where the plaintiff had leased all the "good No. 1 fire clay on his land," subject to the condition that the lessees should mine or pay for not less than 2,000 tons of clay every year, paying therefor 25 cents per ton, the court held that the lessees were not bound to pay for 2,000 tons per year, unless there was No. 1 clay on the land in such quantities as would justify its being taken out. In Ridgely v. Conewago Iron Co. (C. C.) 53 F. 988, the holding was that a mining lease requiring the lessee to mine 4,000 tons of ore annually, and to pay therefor a fixed sum per ton, or, failing to take out such quantity, to pay therefor, imposed no obligation on the lessee to pay for such stipulated quantity after the ore in the demised premises had become exhausted. There are many other cases dealing with mining leases of this character, and the general course of decision is to the effect that the performance of the obligation to take out a given quantity or to pay royalty thereon, if it be not taken out, is excused if it appears that the land does not contain the stipulated quantity. Brooks v. Cook, 135 Ala. 219, 34 So. 960; Muhlenberg v. Henning, 116 Pa. 138, 9 A. 144; McCahan v. Wharton, 121 Pa. 424, 15 A. 615. * * *

We think the findings of fact make a case falling within the rule of these decisions, the parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were "available," we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it.

"A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost." 1 Beach on Contracts, § 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But, where the difference in

cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth, and gravel. * * *

SECTION 6.—WHEN THERE MAY BE RECOVERY FOR A PART PERFORMANCE

1. Recovery for Part Performance Where the Contract is Entire

(1) In Construction Contracts

We have already seen that where a contractor is materially in default—that is, where there is less than a substantial performance of the contract—there can be no recovery of the contract price; for the reason that the breach of the condition precedent relieves the other party from his obligations under the contract. However, where the contractor has acted with a bona fide intention of performing the contract, and the owner retained the benefit of the labor and materials expended in the partial performance, the law implies a promise on the owner's part to pay the reasonable value of that benefit; and the contractor may recover in quasi contract or a quantum meruit for the amount of the benefit received less the damages suffered by the owner. Note that the requisite elements of an action quasi contractual are, first, that there is an actual benefit to the owner, and second, that the performance was in good faith, that is, that the breach was not willful.

GILLIS et al. v. COBE et al.

Supreme Judicial Court of Massachusetts, 1901. 177 Mass. 584, 59 N. E. 455.[16]

[Action by Daniel B. Gillis and others against Mark H. Cobe and others. From a judgment in favor of defendants, plaintiffs appeal.]

Loring, J. [The first question submitted to the court by the referee is whether the plaintiffs' right to recover the contract price for the construction of the building depends upon their securing a certificate from the architect.] * * * Though the provisions of this contract are not as explicit as building contracts usually are in this respect, yet, on a fair construction of its terms, we think that the plaintiffs' right to recover does depend upon their producing a certificate from the architect. In the specifications, which are made part of the

[16] Statement of facts is omitted.

contract, there is this provision: "Payments to be made only upon a written order from the architects as the work progresses. No order will be considered an acceptance of the work on which it is given. Only an order for the final payment shall be considered as an acceptance of the work." This clause, taken in connection with the two following clauses of the contract, must be taken to make the payment of the contract price dependent upon the architect's giving his certificate: "Any disagreement between the owners and the contractor upon any matter arising from these specifications or drawings of the work required shall be decided by the engineers and architect, whose decision shall be final and binding on both parties." "All payments shall be made upon the written certificate of the engineers and architects." We are therefore of opinion that this question does arise.

Further, we are of opinion that the act of the defendants in using the building when the plaintiffs stopped working on it was not an acceptance of it. By the express terms of the contract, "only an order for the final payment shall be considered as an acceptance of the work." The building became the defendants' property as it was affixed to their land; when the plaintiffs stopped working on it, and the architect refused to give a certificate that it was constructed in accordance with the requirements of the contract, the defendants were not bound to remove the building, nor were they bound, so long as the building stood on their land, to abstain from using what was their own. The use of the building, therefore, was not an acceptance of it, under the contract. * * * [By reason of this breach of condition precedent, therefore, there can be no recovery under the contract for the contract price.]

The second question is whether a recovery can be had in this case [in quasi contract or quantum meruit] without furnishing the architect's certificate. * * *

The plaintiffs further contend that they are entitled to the fair value of the structure, viewed with reference to the labor and materials which produced it. * * * But one who has done work under a special contract, and resorts to a recovery under the principle of Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 268, [quasi contract], recovers on the ground, and only on the ground, that the result of his work is of some benefit to the defendant; he comes into court admitting that he has not done what he agreed to do, and that he cannot hold the defendant on his promise to pay him the contract price; more than that, he admits that the part which he has failed to perform is one that so far goes to the essence of the contract that it is a condition precedent to a recovery by him on the contract; for, if the part which he agreed to perform and did not perform was of slight importance, it is not a condition precedent; he can recover the contract price without performing it, and the only advantage which the defendant can take of it is by way of recoupment, or by a cross-action, in which the burden is on him, the defendant, to prove the damage he has suffered from its nonperformance. The only ground on which a plaintiff who resorts to a recovery under the principle of Hayward v. Leonard is entitled to re-

cover anything is that, though so far as his contract rights are concerned, he is entirely out of court, yet it is not fair that the defendant should go out of the transaction as a whole with a profit at his, the plaintiff's, expense; and therefore if the structure, which, for the purposes of a recovery on this ground, he necessarily admits does not come up to the contract requirements in essential particulars, is nevertheless a thing of some value, the defendant ought to make him compensation therefor. That such is the ground on which a recovery can be had in such a case was laid down in the original case of Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 268, and has been repeated in the subsequent decisions. * * *

It had been held by this court 12 years before Hayward v. Leonard was decided that there could be no recovery on the doctrine afterwards stated at length in that case, if the result of the plaintiff's misdirected work was not a thing of value. * * *

There are no cases in which the amount of the compensation to which a plaintiff who resorts to a recovery under the principle of Hayward v. Leonard is entitled has received deliberate consideration. But if the sole ground of his being entitled to anything is that, were he not paid something, the defendant would profit at his expense, although his claim is without merit so far as rights under the contract are concerned, it is clear that the amount which should be paid the plaintiff is the amount by which, were no payment made, the defendant would profit at his expense; that is to say, the amount which represents the fair market value of the structure which, against the wishes of the defendant, has been put upon his land. * * *

The case at bar, then, is a case where the plaintiffs have not satisfied the architect that they did their work as required by the contract, as by the terms of the contract they had to do before they were entitled to be paid for it, and where it is expressly found by the referee that "there was no fraud or collusion between architect and defendants which caused him to withhold the certificate, and the retention by the architect of the certificate was, if wrong, from error of judgment." And it is a case where the plaintiffs have failed to prove that they have performed their contract in constructing the filling on which the floor rests which has given way, and where, by the finding of the referee, "the damage to the defendants by reason of the sinking of the floor is in excess of the amount of the plaintiffs' claim." * * *

[Therefore, there being no substantial performance of the contract itself, there can be no recovery for the contract price; and, there being no showing that the labor and materials expended by plaintiffs on defendants' building was of actual value or benefit to defendants, it follows that there can be no recovery on a quantum meruit. The judgment of the lower court in favor of defendants must be sustained.] [17]

[17] The dissenting opinion of Knowlton, J., in which Barker and Hammond, JJ., concur, is omitted.

CARROLL v. BOWERSOCK.

Supreme Court of Kansas, 1917. 100 Kan. 270, 164 P. 143, L. R. A. 1917D, 1006.

BURCH, J. The action was one to recover for part performance of a contract to construct a reenforced concrete floor in a warehouse, which was destroyed by fire before the floor was completed. The plaintiff recovered, and the defendant appeals. * * *

The court permitted recovery for substantially what the plaintiff had done by way of performance of the contract before the fire.

The contract was to place the floor in a specific warehouse. Destruction of the warehouse without fault of either party put an end to construction of a floor in that warehouse. No warehouse except the one destroyed having been contemplated or contracted about, the defendant could not be charged with delinquency for not building another. To do so would be to charge him with breach of an obligation which he did not assume. If continued existence of the particular warehouse to which the contract related were not taken for granted by both parties, the plaintiff would be bound by his contract and could not recover at all, no concrete floor having been constructed. * * *

If a contractor should engage to furnish all labor and material and build a house, and the house should burn before completion, the loss falls on him. If a contractor should engage to refloor two rooms of a house already in existence, and should complete one room before the house burned, he ought to be paid something. So far the authorities are in substantial agreement.

The principle upon which the contractor may recover in a case of the character last instanced has been variously stated. Sometimes it is said that it was a material and substantive part of the contract on the owner's side that he would have the house in existence as long as might be necessary for the contractor to do the work. This statement of the principle arbitrarily attaches to the contract a warranty which the parties did not put there, and places the owner in default when he has been guilty of no wrong. Impossibility of performance because of destruction of the building was not contemplated by either party. Performance was prevented without fault of either party, and the true rule is that neither party can be charged with delinquency because the contract cannot be fulfilled. * * *

The contractor cannot give and the owner cannot obtain that which they contracted about. Neither one can complain of the other on that account, and the law must deal with the new situation of the parties created by the fire. The owner cannot be called on to reimburse the contractor merely because the contractor has been to expense in taking steps tending to performance. A contractor may have purchased special material to be used in repairing a house, and may have had much millwork done upon it. If the material remain in the mill, and the house burn, there can be no recovery. If the milled material be delivered at the house ready for use, and the house burn, there can be no recovery. It takes something more to make the owner liable for what the

contractor has done toward performance. The owner must be benefited. He should not be enriched at the expense of the contractor. That would be unjust, and to the extent that the owner has been benefited, the law may properly consider him as resting under a duty to pay. The benefit which the owner has received may or may not be equivalent to the detriment which the contractor has suffered. The only basis on which the law can raise an obligation on the part of the owner is the consideration he has received by way of benefit, advantage, or value to him.

The question whether or not the owner has been benefited frequently presents difficulties. Sometimes the question is answered by the owner's own conduct, as when by taking possession, or by insuring as his own property, or by other act, he evinces a purpose to appropriate the contractor's material and labor. Sometimes the circumstances are such that the owner is precluded from rejecting the fruits of the contractor's efforts if he would, as when one room is finished under a contract to refloor two. * * *

The test of benefit received has been variously stated. Sometimes it is said that benefit accrues whenever the contractor's material and labor, furnished and performed according to the contract, have become attached to the owner's realty. The facts of particular cases suggest different forms of expression. After considering all the authorities cited in the briefs, the court is inclined to approve, for the purposes of this case, the form adopted by the Supreme Judicial Court of Massachusetts, in the case of Young v. Chicopee, 186 Mass. 518, 72 N. E. 63, cited by the plaintiff. The action was one for labor and material furnished to repair a bridge destroyed by fire while the work was proceeding. The contract required at least half of the material to be "upon the job" before work commenced. The contractor complied with this condition, and distributed material "all along the bridge" and on the river bank. A portion of the material thus distributed but not wrought into the structure was destroyed by fire. Liability for work done upon and material wrought into the structure was not disputed, but the contractor sought to make good his entire loss. The court said:

"In whatever way the principle may be stated, it would seem that the liability of the owner in a case like this should be measured by the amount of the contract work done which, at the time of the destruction of the structure, had become so far identified with it as that but for the destruction it would have inured to him as contemplated by the contract." 186 Mass. 520, 72 N. E. 64.

Applying the test stated to the facts of the present controversy, it is clear that the plaintiff should recover for the work done in cutting the old floor away from the wall and in removing such part of the old floor as was necessary. The warehouse was improved to that extent by labor, the benefit of which had inured to the defendant when the fire occurred. If the fire had not occurred, the undesirable floor would have been out of the way, precisely as the contract contemplated. Likewise, the contractor should recover for the completed concrete footings.

The contractor should not recover for material furnished or labor

performed in the construction of either column or floor forms. They were temporary devices, employed to give form to the structure which was to be produced. They were not themselves wrought into the warehouse, were to be removed when the work was completed, and inured to nobody's benefit but that of the contractor. The contractor should not recover for either upright or floor rods, or for the labor of putting them in place. While the rods were wired together, they were not attached to the building and would not have been wrought into the structure until the concrete was poured. If the fire had not occurred, the contractor could have removed the rods without dismembering or defacing the warehouse, and the defendant could not have held the rods as amalgamated into the fabric of his structure. There should be no recovery for superintendence and use of tools, except as regards that part of the work done which had become identified with the warehouse itself. Other items sued for should be allowed or disallowed by application of the principle indicated. * * *

The defendant says he had a right to a specific kind of completed floor which he could test and which would comply with a prescribed test, and that cutting away the old floor from the walls of the building and concrete footings for a floor which was never laid, were of no value to him. The test is whether or not the work would have inured to his benefit as contemplated by the contract if the fire had not occurred. The cutting away of the old floor was done according to the contract, and the defendant had the benefit of that work as soon as it was finished. The evidence was that putting in the concrete footings was the next step in the construction of the concrete floor. Those footings would have inured to his benefit, in accordance with the contract, if the fire had not occurred. They became a part of his warehouse. Unless he could reject them for want of substantial compliance with the contract so far as they were concerned, he was benefited by them at the time of their incorporation into his structure. Test of a completed concrete floor was one of the things rendered impossible by the fire. * * *

The judgment of the district court is reversed, and the cause is remanded, with direction to take such additional evidence as may be necessary and determine the rights of the parties according to the views which have been expressed.[18]

[18] The dissenting opinion of Johnston, J., in which Dawson, J., concurs, is omitted.

(2) In Personal Service Contracts

BRITTON v. TURNER.

Superior Court of Judicature of New Hampshire, 1834. 6 N. H. 481, 26 Am. Dec. 713.[19]

PARKER, J. It may be assumed that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of one hundred and twenty dollars, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances, recover a reaonable sum for the service he has actually performed, under the count in quantum meruit. Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract, by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed. However much * * * this has been considered the settled rule of law upon this subject, * * * [we cannot agree with this view.] Where * * * a party actually receives labor or materials [under a contract,] and * * * derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." * * *

If, on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged. * * * He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing, the law cannot and ought not to raise an implied promise to pay. But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. * * *

[19] Statement of facts is omitted.

In fact, we think the technical reasoning that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it—that the contract being entire there can be no apportionment—and that there being an express contract no other can be implied, even upon the * * * performance of service, is not properly applicable to this species of contract, where a beneficial service has actually been performed. * * *

Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, * * * without a specific proviso to that effect. * * * It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretense for a recovery if he voluntarily deserts the service before the expiration of the time.

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth or the amount of advantage he receives upon the whole transaction, * * * and in estimating the value of the labor, the contract price * * * cannot be exceeded. * * * The benefit * * * which the party takes by the labor, therefore, is the amount of value * * * he receives, if any, after deducting the amount of damage. * * * If in such case it be found that the damages are equal to, or greater than, the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover. * * *

[The judgment for the plaintiff will be sustained.]

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2. Recovery for Part Performance Where the Contract is Divisible

Where the contract is divisible rather than entire, the promise is in fact regarded as a series of promises to do a series of acts. As for the severable parts or acts already performed, there may be recovery on the contract and for the contract price. The nonperformance of one or some of the remaining divisible parts will not discharge the other party as to those portions already performed. A divisible contract is regarded as a series of contracts, and for full performance of any one entire portion there may be a recovery of the price agreed for that portion. Where there has been only part performance of a severable portion, the question of recovery therefor will be governed by the rules applicable to cases of part performance of entire contracts.

KEELER v. CLIFFORD.

Supreme Court of Illinois, 1897. 165 Ill. 544, 46 N. E. 248.

[Action by Patrick Clifford against James H. Keeler. From a judgment of the appellate court (62 Ill. App. 64) affirming a judgment for plaintiff, defendant appeals. This is an action on a contract for grading or levelling. It appears from the evidence that under the terms of the contract plaintiff agreed to remove and level all dredged dirt from the Calumet River south of 106th street for the sum of $5,000, to be paid as follows: "When one-fourth of said work is finished, $1,000 is to be paid by said Keeler; and when one-half of said work is completed, another $1,000 is to be paid by said Keeler; and when three-fourths of said work is completed, another $1,000 is to be paid by said Keeler; and when the whole work is completed, the unpaid portion of the $5,000 shall be paid by the said Keeler." It appears that after plaintiff had completed over half the said work he applied to defendant, Keeler, for the third payment due, and upon the failure to receive the same, plaintiff abandoned the contract and filed suit for the pro rata portion of the contract price.]

MAGRUDER, C. J. * * * Appellant contends that the contract is entire, and that the appellee was obliged to complete the entire contract before he could have a standing in court. We do not regard this objection as well taken. The question whether a contract is entire or severable cannot be determined by any precise rule, but must depend upon the intention of the parties, which in each case is ascertained from the language employed and the subject-matter of the contract. "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. And the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire." 2 Pars. Cont. marg. p. 517. Wharton, in his work on the Law of Contracts, says (section 748): "When a consideration is divisible, and the price can be apportioned, then, if a distinct and divisible portion of the consideration fails, the price paid for such portion can be recovered back." See, also, Bank of Antigo v. Union Trust Co., 149 Ill. 343, 36 N. E. 1029. Here the contract provides that, when certain portions are completed, certain payments shall be made. By comparing the terms of the contract in evidence with the definition of a severable contract, as given in the quotations above set forth, it will be seen that the contract here is a severable one. The instruction under consideration complies with law as laid down by the court in a number of cases. We have held that a party who complies with this contract may recover for breach of it by the other contracting party, or he may abandon the contact and recover pro tanto; but in the latter case the contract price will fix the measure of damages. Evans v. Railroad Co., 28 Ill. 189; Folliott v. Hunt, 21 Ill. 654; Richards v. Shaw,

67 Ill. 222; Dwyer v. Duquid, 70 Ill. 307; Dobbins v. Higgins, 78 Ill. 440. In Dobbins v. Higgins, supra, a contract had been entered into for grading a railroad, for which payments were to be made on monthly estimates; and, on the failure of the railroad to make one of the monthly payments for 12 days or more after it became due, the plaintiffs abandoned the work and sued; and it was there held that the plaintiffs, having given notice that further failure to pay would be treated as a rescission, were justified in thus abandoning the work, and were entitled to recover for the work done and not paid for, "pro tanto," at the contract price. * * *

The judgments of the appellate court and of the superior court of Cook county are affirmed. Affirmed.

CHAPTER 8

ASSIGNMENT OF CONTRACTS

SECTION 1.—ASSIGNMENT OF RIGHTS AND BENEFITS

In General.—An assignment is a transfer to another of the rights under a contract, by the party originally entitled thereto. The party making the transfer is called the assignor; the party to whom the transfer is made is called the assignee. The assignment may be of rights or obligations. The question is whether either or both may be assigned without the consent of the other party to the contract. We shall consider the assignment of rights and obligations separately.

Novation.—Where one of the parties to a contract wishes to assign his rights and obligations under it, and the other party consents to this assignment, then no difficulty is encountered, for there is here only a substitution of parties by agreement. This substitution of a new obligation for an old one is called a novation. The assignor is released from his obligations by the other party to the contract; the consideration for the release being the new rights gained against the assignee. But where there is consent to the assignment by the other party to the contract, but no release of the original party, then there is no novation; for the original party yet remains liable.

Example of Novation.—A, a landowner, entered into a contract with B, a builder, by which B agreed to build a house for A according to plans and specifications, and A agreed to pay B $15,000 therefor. When the house was half finished, A sold his land to C, and assigned to C all his rights in this contract. If B agreed to this assignment, accepting C's promise to pay him for building the house in substitution for A's promise, and if B released A from his promise to pay, this three-party agreement would constitute a novation.

Assignment of Rights Without Consent.—There can be no doubt but that consent is unnecessary in the assignment of absolute rights. Thus, where A has a sum of money due him from his employer for past services rendered, clearly he may assign his right to collect this money. The right is not conditioned upon his performing services in the future, but is absolute, or "executed." It is where conditional rights are attempted to be assigned—that is, where the contract is executory—that difficulties as to assignment arise. The general rule is, however, that an

executory contract which does not involve personal confidence can be assigned by one of the parties without the consent of the other party to the contract, unless there is some provision in the contract to the contrary.

MALLIN v. WENHAM et al.

Supreme Court of Illinois, 1904. 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233.

[The plaintiff, Mallin, had been employed for several years prior to this suit by Armour & Co. on a salary of $100 per month. He had no definite contract of employment, but was employed from month to month. He borrowed money from Wenham, defendant herein, and executed to Wenham an assignment of his wages to be earned in the future. Subsequently Wenham claimed Mallin's wages due from Armour & Co., and Mallin filed this, without offering to pay Wenham the $300 he owed him, and prayed that his assignment of wages be declared null and void, on the ground that at the time the assignment was made he had no right against Armour & Co. which was capable of assignment, and that Wenham be restrained from interfering with Mallin's salary. The question is whether an assignment transferring wages to be earned in the future under an existing employment is valid.]

RICKS, J. In respect to the first proposition mentioned, the authorities are ample and conclusive to the effect that an assignment of wages to be earned in the future, under an existing employment, is valid. This precise question has frequently been passed upon by the courts of the different states and of England, and, so far as we are advised, the courts of dernier ressort have, without exception, upheld such contracts, where they have been for a valuable consideration and untainted with fraud. The authorities are to the effect that it is not necessary that there be an express hiring for a definite time, but the existence of the employment at the time of the assignment is sufficient. In the case at bar appellant was, and had been for some time previous, in the actual employ of Armour & Co. at a fixed price per month. It is true, such employment was not of any definite duration, and appellant might abandon the same at any time, or his employer might discharge him. The subject-matter of the contract had but a potential existence, but it was such a property right as might legally be disposed of.

The remarks of the court in Thayer v. Kelley, 28 Vt. 19, 65 Am. Dec. 220, are very pertinent to the subject in hand, and we here quote them: "When the debtor is in the actual employment of another, and is receiving wages under a subsisting engagement, an assignment by him of his future earnings may be made, not only for the security and payment of a present indebtedness, but for such advances as he may find it necessary to obtain. This principle is fully established by the cases to which we were referred. Weed v. Jewett, 2 Metc. 608, 37 Am. Dec. 115; Brackett v. Blake, 7 Metc. 335, 41 Am. Dec. 442; Field v.

Mayor of New York, 6 N. Y. 187, 57 Am. Dec. 435; Emery v. Lawrence, 8 Cush. 151. The debtor in this case, at the time of his assignment to the claimants, was in the actual employment of the trustees under a subsisting contract, at a given price per day, and had in that manner labored for them for some two or three years previous; and though he had the right to leave their employment and they had the right to discharge him, yet so long as that relation existed between them we think the authorities are satisfactory in holding that the claimants were entitled to receive, under that assignment, his accruing wages in payment of the advances which they had made." * * *

MUELLER v. NORTHWESTERN UNIVERSITY.

Supreme Court of Illinois, 1902. 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194.

[Northwestern University entered into a contract with one Fred H. Sammis for the construction of the marble mosaic and tile work in the Illinois Trust & Savings Bank, a building constructed by said University in the city of Chicago, at an agreed price of $27,344. A term of this contract provided "that the contractor shall not sell, assign, transfer, or set over this contract, or any part thereof or interest therein, unto any person whatsoever, without the consent of the architects, and any such assignment shall be absolutely null and void." After Sammis had performed nearly all of the work, he assigned the balance of $11,000 due from the University on the contract to Mueller. Mueller notified the University of the assignment. Disregarding the assignment and notice thereof, the University paid over the balance of the money due to Sammis. Mueller is now suing for this amount.]

HAND, J. It is first contended, the assignment to Mueller being in express violation of the terms of the contract, as against the University the assignment is void, and that Mueller is entitled to no relief by virtue of said assignment, as against the University, even in a court of equity. The contract between the University and Sammis in express terms provides that the contractor shall not sell, assign, transfer, or set over said contract, or any part thereof or interest therein, unto any person or persons whomsoever, without the consent in writing of the architects previously had and obtained thereto, and that an assignment or transfer of the contract without the written consent of the architects first had and obtained thereto shall be absolutely null and void; and no claim is made that the architects or the University consented in writing to the assignment made by Sammis to Mueller. The assignment relied upon not having been assented to in writing by the architects or the University, is such assignment null and void as to the University? The rule is laid down in 2 Am. & Eng. Enc. Law (2d Ed.) p. 1035, that the parties to a contract may in terms prohibit its assignment, so that an assignee cannot succeed to any rights in the contract by virtue of the assignment thereof to him, and the rule thus announced is well supported by the authorities.

[The court concluded that, since the contract by its express terms excluded an assignment without consent, the assignment to Mueller was void, and the payment by the University to Sammis discharged its liability.]

SECTION 2.—ASSIGNMENT OF OBLIGATIONS

SLOAN v. WILLIAMS et al.

Supreme Court of Illinois, 1891. 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496.

MAGRUDER, J. [This is a bill filed by complainant, Sloan, against one John Williams for the specific performance of a contract to sell land.] On March 11, 1885, a written contract was entered into between George A. Du Puy, an attorney at law, and the said John Williams, by the terms of which Du Puy agreed to take all such steps as might be necessary to perfect the title of Williams to certain lots in Ravenswood, in Cook county, by filing bills to remove clouds, procuring releases, holding possession by repairing fences and posting sale-boards, etc., and to do all the work incident to carrying out the contract, and that he should not receive any remuneration of any sort except that he should have the option to buy or sell said lots as therein set forth, and should not be required to furnish any money; and Williams agreed to furnish money to discharge liens, redeem from tax-sales, pay trustee's charges, and costs necessary to set aside tax-titles; and that Du Puy, in consideration of the services to be rendered by him should have the sole privilege of purchasing any one or more of said lots, or of effecting a sale of any one or more of them to such party as he might desire, at the price of $500 each, for the space of 18 months from the time when everything necessary to make the title perfect in Williams shall have finally been done, said price to be paid in cash, or one-quarter thereof in cash and the balance in three years, and to be secured by mortgage on the premises, or "said sale may be upon any other terms which said John Williams may deem satisfactory to himself." The contract also contains provisions that Williams will pay all taxes and special assessments due when the sale is made, and will furnish to the purchaser an abstract of title, and will convey said lot or lots by deed covenanting against his own acts, and containing "usual release of all right of dower and homestead which any person may have in any one or more of said lots so sold."

The bill sets forth the contract in full, and alleges that on December 23, 1886, Du Puy, for value received, duly assigned in writing to the complainant, Sloan, all his right, title, and interest in said contract, and rights and benefits thereunder, and that, by virtue of such assignment, all the rights and interests of Du Puy accrued to the complainant. The bill further avers that Williams was bound, under the agreement and the assignment thereof, on the payment or tender to him of $500, to

convey to complainant, by deed "which should contain the usual release of all right of dower and homestead which any person might have in or to said lot;" that, at different times in the spring and summer of 1887, complainant tendered to Williams, in his own name and in that of Du Puy, said sum of $500, and demanded that he furnish an abstract of title, "and also that he so deliver to your orator such a deed, as above specified." The bill also offers to bring the $500 into court in payment for "the said conveyance, as aforesaid."

The main ground of objection to the bill is that the contract which it seeks to enforce is one which calls for the personal services and skill of one of the parties thereto, and therefore is not assignable. We think that this objection is well taken, and that the demurrer to the bill was properly sustained. Du Puy was a lawyer by profession, and, by the terms of the contract, was required to make use of his professional skill in perfecting the title to the lots by instituting and carrying on legal proceedings to remove clouds, by procuring releases, and by the use of other methods. The contract itself upon its face does not provide for any assignment of it. It is well settled that "contracts in which the personal acts and qualities of one of the contracting parties form a material ingredient are, in general, not assignable." 2 Chit. Cont. (11th Amer. Ed.) p. 1363. Engagements for personal services requiring skill, science, or peculiar qualifications may not be assigned. Devlin v. Mayor, 63 N. Y. 8. A party who thus agrees to use his personal skill and knowledge, and has been contracted with by reason of the trust and confidence placed in him personally, cannot, while the agreement is still executory, substitute another in his place by assignment, in order to perform the service, without the consent of the other contracting party. * * *

DEMAREST v. DUNTON LUMBER CO.

Circuit Court of Appeals of the United States, Second Circuit, 1908. 161 F. 264.

WARD, Circuit Judge. The plaintiff sues as assignee of a contract dated December 11, 1900, between W. E. Kelly & Co. and the Dunton Lumber Company, and complains that the defendant has failed and refused to deliver to him lumber covered by the contract. Under the contract the lumber company sold to Kelly & Co. the entire cut of white pine lumber for 1901, except so much as it should need for its retail trade in the city of Rumford Falls, agreeing to retain, not the best of the lumber, but only an average grade for that trade. Delivery was to be f. o. b. cars at Rumford Falls, Kelly & Co. to pay within 10 days from date of invoice. The logs were to be cut in lengths of 12, 14, and 16 feet; but Kelly & Co. agreed to accept some lumber shorter than 12 feet, not less than 8 feet, and some longer than 16 feet. The trial judge held that this contract was not assignable, and that, therefore, the plaintiff had no right of action.

While the authorities do not differ as to the principle that a contract personal in its nature cannot be assigned by one party without the con-

sent of the other, they differ in the application of the principle; the question in each case being whether the contract is personal or not. The law on the subject for the federal courts has been laid down by the Supreme Court in Arkansas Smelting Company v. Belding Mining Company, 127 U. S. 379, 387, 8 S. Ct. 1308, 32 L. Ed. 246, in which Mr. Justice Gray said:

"At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman: 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305, 93 Am. Dec. 93; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; King v. Batterson, 13 R. I. 117, 120, 43 Am. Rep. 13; Lansden v. McCarthy, 45 Mo. 106. The rule upon this subject as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred, if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pollock on Contracts, 425."

The contract under consideration is not merely for the sale of personal property for cash, but implies confidence in Kelly & Co., because they were to have 10 days' credit after title to the lumber passed to them, and because the amount of lumber shorter or longer than the lengths provided for in the contract which they were to accept was not fixed. So, also, the amount of lumber the lumber company needed for its retail trade was not fixed, and that amount, as well as the grade of lumber retained, were subjects which the lumber company might have been willing to leave open with Kelly & Co., but not with their assigns. The rights of Kelly & Co. were coupled with liabilities and involved personal confidence. See, also, Snow v. Nelson (C. C.) 113 F. 353. * * *

MACDONALD et al. v. O'SHEA et al.

Supreme Court of Washington, 1910. 58 Wash. 169, 108 P. 436, Ann. Cas. 1912A, 417.

[This was a suit by certain mechanic's lienors and materialmen against the National Surety Company for certain unpaid claims and liens incurred in the construction of a building. It appears from the evidence that one John J. Walsh entered into a contract with the Standard Furniture House for the construction of a warehouse. By the terms of the building contract Walsh was to furnish all material and labor for

the erection and completion of the said building according to plans and specifications, and was to protect the property from all liens. The National Surety Company executed a surety bond for the faithful performance of this building contract. Walsh died when the building was only partially completed. It is maintained by the defendant surety company that this contract was personal in its nature, involving personal trust and confidence in Walsh as builder, and that therefore the contract was one not capable of assignment; further, that the contract being personal to Walsh its obligations did not survive his death, and that therefore the surety company was no longer liable.]

PARKER, J. * * * Learned counsel for appellants contend that the contract for the construction of the building constituted such a personal relation between Walsh and the Standard Furniture House that his obligation under the contract to construct the building did not survive, but died with him, and that there was no obligation cast upon his personal representative, or his estate, requiring the completion of the building; and hence the surety company was under no obligation to pay lien claims accruing after the death of Walsh in the construction of the building. The general rule governing the survival of contractual obligations as against the personal representative and the estates of deceased persons is stated in 2 Parsons on Contracts (9th Ed.) 685, as follows: "It is a presumption of law that parties to a simple contract intended to bind not only themselves, but their personal representatives; and such parties may sue on a contract, although not named therein. Hence, as we have seen, executors, though not named in a contract, are liable, so far as they have assets, for the breach of a contract which was broken in the lifetime of their testator. And, if the contract was not broken in his lifetime, they must not break it, but will be held to its performance, unless this presumption is overcome by the nature of the contract, as where the thing to be done required the personal skill of the testator himself." 18 Cyc. 239. This rule is elementary. The difficulty in applying it arises when the facts of the particular case are such as to render it doubtful as to whether or not the thing to be done requires the personal skill of the deceased himself. * * *

It is clear that the obligation of deceased under this building contract was that of an independent contractor, and was not a matter of rendering personal service. 16 Am. & Eng. Enc. of Law (2d Ed.) 187. There was nothing in the contractual relation existing between the deceased and the Standard Furniture House at all approaching the relation of master and servant; nor was it contemplated that the building or any part thereof when completed should be the product of his own personal labor or skill, either as laborer, mechanic, or artist. He no doubt expected to perform his contract through the labor and skill of others to a very large extent, and he had the right to so perform the whole of his contract if he so desired. We have not had our attention called to any authorities holding that the obligation of an independent contractor under an agreement to build a building does not survive him, if the contract is not performed at the time of his death, while there is eminent authority to the contrary. * * *

We are of the opinion that the obligations of John J. Walsh under this contract survived him and were binding upon his estate. It follows that the surety company was as much bound to the performance of this contract after the death of Walsh as it would have been had he lived to perform the contract in person. * * *

SECTION 3.—PRIORITIES OF SUCCESSIVE ASSIGNEES

In re LETERMAN, BECHER & CO., Inc.

Circuit Court of Appeals of the United States, Second Circuit, 1919. 260 F. 543.

[This was a controversy between two successive assignees of debts owing the firm of Leterman, Becher & Co., bankrupt, as to which should be entitled to the right of collection. It appeared that on October 15, 1917, Leterman, Becher & Co. assigned certain accounts receivable to the firm of Coleman & Co., bankers; that in November, 1917, a similar assignment was made of the same accounts to the Tawas Company; that no notice of the assignment of the accounts was given to the debtors of the bankrupt at the time of the assignments, either by Coleman & Co. or the Tawas Company. But a few days before the bankruptcy and on January 11, 1917, Coleman & Co. sent letters of notification to the debtors, informing them that the accounts had been assigned to Coleman & Co. and were payable only to them. The Tawas Company on the same day also sent notices of the assignment and that payment should be made to them.]

ROGERS, Circuit Judge. * * * This controversy arises out of the failure of an assignee of choses in action to give notice to the debtors at the time of the assignment. The result is that a subsequent assignee who claims to have first given notice is seeking priority of payment out of the proceeds of assigned choses in action now in the hands of the trustee of the bankrupt assignor. * * *

In Methven v. Staten Island, 66 F. 113, 13 C. C. A. 362, this court had before it the question whether an assignee who first gives notice to the debtor has the prior right though the assignment to him is later in date than that to the other assignee. The court held that as between two assignees the one who first gives notice has the better right. In so deciding this court declared that the question is one of general jurisprudence and that the decisions of the highest court of the state are not controlling. We adhere to that ruling in this case. The clause found in the agreement between Coleman & Co. and the bankrupt, that "this agreement shall be construed according to the law of the state of New York," if binding as between assignor and assignee, is not binding as against a subsequent assignee, who was not a party to it. It is not decisive in this court of the question now presented that the courts of the state of New York have laid down the rule that, as between different assignees of a chose in action by express assignment from the same

person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor. Fortunato v. Patten, 147 N. Y. 277, 283, 41 N. E. 572. In this respect the rule in New York differs from the rule in the federal courts, and from that which prevails in England and in the courts in many of the states.

The leading case on this subject is the well-known case of Dearle v. Hall, 3 Rus. 1, which held that a third assignee who had given notice was entitled to priority over a first and second assignee who did not give notice. That case and the cases which have followed it have gone upon the theory that personal property passes by delivery of possession, and that if one who acquires the right to take possession does not take it he is responsible for the consequences. A chose in action does not admit of tangible actual possession, but the assignee who gives notice to the legal holder of the fund does that which is tantamount to obtaining possession by placing the holder of the fund under an obligation to treat it as his property; and if he omits to give that notice he is guilty of the same neglect as he who leaves a personal chattel to which he has acquired a title in the actual possession and under the absolute control of another person. * * *

The question, then, is whether the notices Coleman & Co. sent, and which went forward as registered mail, reached the debtors before or after those sent by the Tawas Company, and which were deposited in the post office on the same day and were forwarded as unregistered mail. The evidence, if it is to be believed, shows that the Tawas Company deposited its notices at 6 p. m. All that appears as respects the hour of mailing of the notices of Coleman & Co., is that they must have been mailed some time prior to 8 p. m. * * * It is not, however, important to know the hour when the Coleman registered notices were mailed, for it definitely appears that all mail trains do not carry registered mail, and that there are more mail trains carrying mail not registered than there are trains carrying registered mail, and the authorities of the post office testified that the registered mail was not sent to the Pennsylvania Railroad Terminal to be sent forward by train until 1:10 a. m. of the next day. There was, therefore, not only a delay at the New York post office in dispatching the Coleman notices, but there was also delay at the offices to which the notices were sent, in the delivery of them to the parties for whom they were intended, after they reached their destination. In the ordinary course of business a registered letter is not delivered as promptly as an unregistered one. The inference is irresistible that the Tawas Company's notices were received by the debtors before those sent by Coleman & Co.

The order of the District Court is reversed.

SECTION 4.—DIFFERENCE BETWEEN ASSIGNMENT AND NEGOTIATION

GOSHEN NAT. BANK v. BINGHAM et al.

BINGHAM et al. v. GOSHEN NAT. BANK.

Court of Appeals of New York, 1890. 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765.

[This is a suit by Bingham, the purchaser of a negotiable bill of exchange or check, against the Goshen National Bank, the drawer of the said check. It appears that one B. D. Brown by fraudulent representations induced the cashier of the Goshen Bank to issue to him as payee the check of the bank for $17,000. Brown later sold this check to Bingham but through an oversight Brown failed to indorse his name on the back of the check. After procuring the check to be cashed by Bingham, Brown fled to Canada. The Goshen Bank stopped payment on the check, and Bingham is suing the bank on the instrument.]

PARKER, J. As against Brown, to whose order the check was payable, the bank had a good defense. But it could not defeat a recovery by a bona fide holder, to whom the check had been indorsed for value. By an oversight on the part of both Brown and Bingham & Co., the check was accepted and cashed without the indorsement of the payee. Before the authority to indorse the name of the payee upon the check was procured, and its subsequent indorsement thereon, Bingham & Co. had notice of the fraud, which constituted a defense for the bank as against Brown. Can the recovery had be sustained? It is too well settled by authority both in England and in this country, to permit of questioning, that the purchaser of a draft or check who obtains title without an indorsement by the payee holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses. * * *

The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law-merchant as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defenses which would have rendered them unavailable in the hands of a prior holder. This rule is only applicable to negotiable instruments which are negotiable according to the law-merchant. When, as in this case, such an instrument is transferred, but without an indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all

the title of the assignor, and may maintain an action thereon in his own name; and, like other choses in action, it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder. Prior to the indorsement of this check, therefore, Bingham & Co. were subject to the defense existing in favor of the bank as against Brown, the payee. Evidence of an intention on the part of the transferee to indorse does not aid the plaintiff. It is the act of indorsement, not the intention, which negotiates the instrument; and it cannot be said that the intent constitutes the act. * * *[1]

[1] The assignee of a debt gets the same rights against the debtor as the assignor had. If the debtor had defenses to the payment of the debt, they will be as available to him in a suit by an assignee as they would have been in a suit by the assignor. This is but the carrying out of the rule that the buyer of personal property gets whatever rights therein the seller had, and no more; that the innocent purchaser from a thief gets no title to the property sold, for the thief had no title. But the case of negotiable instruments and money presents the exception to this rule; for the holder in due course of a negotiable instrument takes the same free from defenses of the maker. In the above case it will be observed that Bingham took the instrument as assignee, and not as holder, for the indorsement was lacking, and that therefore he was not in the favored position of a holder in due course.

AGENCY

CHAPTER 1

LIABILITY OF PRINCIPAL TO THIRD PARTIES

SECTION 1.—LIABILITY IN CONTRACT—SCOPE OF AGENT'S AUTHORITY

The principal is liable for the contractual acts of his agent provided the agent acted within the real or apparent scope of his authority. This is the fundamental rule governing the rights of third persons who have contracted with a principal through an agent. It is to be noted that the principal is not liable for all contracts entered into in his name by his agent, but only for those which lie within the agent's real or apparent powers. The problem, then, is to discover the meaning and extent of the agent's real and apparent authority.

Real Powers of the Agent.—The real power or authority of the agent comprises both the express and implied powers delegated by the principal. The express powers are those contained within the actual instructions of the principal. For example, if the stockholders of a corporation instruct the president to enter into a contract for the purchase of a railroad, the extent of his express power in this regard is precisely the limit of the instruction.

In addition to the express authority, the agent also has implied power to do all things reasonably necessary to carry the express instruction into effect. So an engineer, told to construct a bridge at a certain place, besides the express authority to build the bridge, would have the implied power to bind his principal on all contracts necessary to the completion of the said bridge—power to hire labor, buy materials, contract for transportation, etc.

Apparent Powers of the Agent.—The apparent powers of the agent, so called, lie outside the scope of his real authority, express or implied. The agent has in fact exceeded his actual power, and the principal would not be liable if it were not for the existence of this doctrine which protects a third person who under the circumstances was justified in believing that the agent had the power to do the act. The test of apparent authority is: Would a reasonably prudent person in like

circumstances have been justified in assuming that the agent had the power to enter into the particular contract in behalf of his principal? The cases which follow illustrate circumstances in which the courts have held the principal liable or not according to whether the agent's act was or was not within the scope of his real or apparent authority.

HODGES v. BANKERS' SURETY CO.

Appellate Court of Illinois, 1910. 152 Ill. App. 372.

Mr. Justice SMITH delivered the opinion of the court.

The suit is in assumpsit for the recovery of damages growing out of an alleged agreement of [the Bankers' Surety Company], appellee, to pay [Hodges] the plaintiff, appellant, whatever the cost * * * of furnishing materials and performing work and labor relative to the mason, concrete and carpenter work on the Eugene Dietzgen factory building at Sheffield and Fullerton avenues, Chicago, exceeded the amount payable to the Federal Concrete Steel Company hereafter called the Federal Company for convenience. Appellant Hodges was a general contractor for the construction of the building, and had sublet the mason, concrete and carpenter work to the Federal Company. The appellee [Bankers' Surety Company] had given its bond to appellant [Hodges] guaranteeing the faithful performance of the contract by the Federal Company. [The Federal Company failed to perform its contract with Hodges, wherefore this suit was filed against the surety. It appeared from the evidence that the plaintiff, Hodges, had entered into a contract to build a factory for the Eugene Dietzgen Company for the certain consideration of forty-seven thousand, five hundred dollars ($47,500); that plaintiff sublet a contract for a part of the construction to the Federal Concrete Steel Company for a consideration of thirty-three thousand dollars ($33,000); that plaintiff entered into an agreement with the Bankers' Surety Company whereby the latter had given its bond for fifteen thousand dollars ($15,000) for the faithful performance by the said Federal Concrete Company of its part of the contract with Hodges, and that the said Federal Concrete Company was in default in the performance of said work, and that thereupon the Bankers' Surety Company, through its agent, George K. Thomas, authorized and directed the plaintiff to proceed and complete the work of the Federal Company, and agreed to pay the said plaintiff whatever amount the cost of completing the work exceeded the $33,000 which was to have been paid to the said Federal Company; that the amount of this excess was more than the amount of the bond upon which the Bankers' Surety Company was obligated to the plaintiff. This suit is for the amount of the $15,000 bond. The defendant denies liability on this bond on the ground that its agent, George K. Thomas, in entering into the contract acted outside the scope of his powers as agent, and that therefore defendant as principal is not liable for his act.]

The evidence for the plaintiff * * * showed that when the bond * * * was issued it had upon it a rubber stamp mark, reading "George K. Thomas, Manager, 604 Chamber of Commerce, * * * Chicago," and that the bonds issued by the defendant were issued and delivered through Thomas as its manager and he collected the premiums or charges therefor. [Also that Thomas corresponded regularly with the defendant upon letter heads of the Bankers' Surety Company, Cleveland, Ohio, which bore Thomas' name as "Manager for Illinois"; and that upon the door of Thomas' office in the Chamber of Commerce building appeared the name of the Bankers' Surety Company, "George K. Thomas, Manager for Illinois." It appeared also from the plaintiff's evidence that the officers of the Bankers' Surety Company of Cleveland often visited Thomas' office.]

The trial court excluded all the evidence, including the offer of proof, upon the ground that no authority was shown to Thomas to make the agreement alleged in the first count of the amended declaration, and instructed the jury to find for the defendant. * * *

The evidence offered by the plaintiff tends to show, in our opinion, that the defendant company is a foreign corporation with its principal office at Cleveland, Ohio; and that it held out Thomas as the manager of its business for the State of Illinois. In Mechem on Agency, paragraph 395, the learned author says: "In general terms it may be said that such an agent has implied powers to do those things which are necessary and proper to be done in carrying out the business in its usual and accustomed way, and which the principal could and would usually do in like cases if present;" and cites German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68, 1 N. E. 113. The same author says in paragraph 283 of the work: "The question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed and not upon the instructions given. Or, in other words, the principal is bound to third persons who have relied thereon in good faith and in ignorance of any limitations or restrictions, by the apparent authority he has given to the agent, and not by the actual or express authority where that differs from the apparent, and this too, whether the agency be a general or a special one."

The evidence presented tended to prove the apparent authority of Thomas to make the agreement set out in the declaration, and that the plaintiff relied upon such authority and the character of the agency bestowed. * * *

In Phenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408, the court in answering the objection that the agent upon whom a demand was made to submit the question of extent of the loss to arbitration in compliance with a provision of the policy in that regard, had no authority to act for the company in that behalf said, at page 335 of the opinion: "We think under the facts of this case, the assured were warranted in treating the agent as a general agent of the company. Persons dealing with an agent cannot know, nor are they required to know, the limitations upon his power to represent his principal. The company is bound by

the acts of its agent in the exercise of powers within the apparent scope of his authority, unless limitations upon such powers is brought to the notice of the assured." * * *

In our opinion the great weight of authority in this country and in England is to the effect that the apparent powers of a general agent managing the business of a foreign corporation [are equal to the powers of officials of the corporation itself, and] are as binding upon the principal as an express authority. * * * If the agent acts within the scope of either express or implied * * * or apparent authority, the principal is bound. * * *[1]

FABER-MUSSER CO. v. WILLIAM E. DEE CLAY MFG. CO.

Supreme Court of Illinois, 1920. 291 Ill. 240, 126 N. E. 186.

CARTER, J. [This was a suit against appellee, the William E. Dee Clay Manufacturing Company, an Illinois corporation, whose factory was located at Mecca, Ind., to recover $20,000 damages for failure to deliver fire brick contracted for by appellant from appellee through appellee's agent, Matthew M. Dee. Directed verdict and judgment for appellee in the trial court.]

The evidence shows that appellant is a dealer in building materials and that appellee is a manufacturer of fire brick and clay products. Appellee maintains an office at Springfield, Ill. (the only office it has in this state), which is in charge of its agent, Matthew M. Dee. The contract sued on consists of an order and letter attached thereto, bearing date May 14, 1917, addressed to appellee and signed by appellant. Opposite the signature of appellant to the order appears: "Accepted—Wm. E. Dee Clay Mfg. Co., per Matthew M. Dee." The evidence shows that Matthew M. Dee was, and had been for several years, in charge of the office of appellee at Springfield. As we understand the record, the evidence shows that the signs on this office indicated that it was the sales office of appellee. * * *

The evidence also tends to show that the Springfield agent of appellee had frequently solicited orders from appellant, but that prior to May 14, 1917, he had been unable to obtain any order; that on April 18, 1917, the appellant wrote a letter to William E. Dee at Springfield asking him to quote prices on fire brick; that Matthew M. Dee, the agent then in charge of the Springfield office, complied with the request and quoted prices by a letter (heretofore referred to as Exhibit 3) written on stationery bearing the printed letter head above set forth, designating the Springfield office as the Western sales office; that on May 14, 1917, in response to a telephone call from appellant, Matthew M. Dee went to Peoria and the order in question was then prepared in duplicate; that on the duplicate copy retained by appellant appear the words: "Accepted—Wm. E. Dee Clay Mfg. Co., per Matthew M. Dee." * * *

Appellant argues that appellee held Matthew M. Dee out to the world

[1] The dissenting opinion of Mack, J., is omitted.

as its agent, and that as such agent he was authorized to make contracts such as the one sued on, and that, furthermore, appellee is now estopped by its acts from repudiating the acts of its agent because it has ratified them. The law is well settled that a principal is bound equally by the authority which he actually gives his agent and by that which by his own acts he appears to give. Nash v. Classen, 163 Ill. 409, 45 N. E. 276; Doan v. Duncan, 17 Ill. 272.

"Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds his agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct would naturally suppose the agent to possess." 2 Corpus Juris, 573.

"A general agent, unless he acts under a special and limited authority, impliedly has power to bind his principal by whatever is usual and proper to effect such a purpose as is the subject of his employment, and in the absence of known limitations third persons dealing with such a general agent have a right to act on the presumption that the scope and character of the business he is employed to transact measures the extent of his authority, and to hold the principal responsible for the agent's acts within such authority." 2 Corpus Juris, 581; see to the same effect, 21 R. C. L. 854.

"Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." 21 R. C. L. 907. * * *

The evidence shows, without contradiction, that appellee is an Illinois corporation; that since its organization the only office it has had in Illinois is the Springfield office, and that Matthew M. Dee, the agent who took this order, has been in entire charge of that office for seven or eight years. The evidence of William E. Dee, the president of the appellee corporation, is to the effect that his brother, Matthew M. Dee, was a traveling salesman, whose duty it was to solicit orders for appellee with his authority, limited to the approval and acceptance by appellee at its principal office in Indiana. It would be a somewhat unusual proceeding for a state to require that every corporation organized in the state for pecuniary profit should have a principal office in some county in the state, and yet to assume that such office could be a principal office and not have some one in charge who could bind the corporation in business matters. A person of ordinary prudence, conversant with business usages and the nature of business affairs, it would seem, would be justified in presuming that a person in charge of such principal office in this state would be authorized to bind the company in any business transaction within the scope of its ordinary business. * * *

Reversed and remanded.

McNEIL v. BOSTON CHAMBER OF COMMERCE.

Supreme Judicial Court of Massachusetts, 1891. 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559.

The petition alleged that defendant offered to give the contract for its new Chamber of Commerce building to the lowest bidder of certain persons invited to bid; that plaintiff was the lowest bidder; that defendant refused to employ him, but did cause the building to be built substantially according to the same plans by another person. At the trial the jury returned a verdict for the plaintiff for $14,500; but the presiding judge, being of opinion that the plaintiff could not on the law of the case prevail, ordered a verdict for the defendant to be returned, and reported the case to the full court. Judgment for plaintiff.

C. ALLEN, J. There was sufficient evidence to warrant the finding that the members of the committee on building, who were present at the conference of March 15th, purported to make a contract on behalf of the defendant, by which they agreed to accept the lowest bid, in case the building was built substantially in accordance with the plans and specifications submitted, without reserving the right to reject bids in that case. * * * Five different builders had been selected by the architects and the building committee of the defendant, to whom written notices had been sent, requesting bids for the defendant's proposed new building. To each of these a copy of the specifications was afterwards delivered, to which was attached a "notice to bidders," containing the terms of the bidding. After an examination of these documents, four of the selected builders declined to submit bids. A conference was thereupon invited and had between the builders and the building committee, at which there was a full discussion, and certain changes from the terms of the "notice to bidders" and from the specifications were agreed upon, and the builders agreed to submit bids. In respect to one particular, which has become material, the testimony is somewhat at variance as to what was the result of this conference. The "notice to bidders" contained the two following provisions: "The work to be let to the lowest and best bidder upon his executing to the Boston Chamber of Commerce a good and sufficient bond," etc. "The building committee of the Chamber of Commerce reserves the right to reject any and all bids." These provisions were the subject of discussion at the conference. All the witnesses agree that the words "and best" were to be struck out of the first clause.

The plaintiff contends that the last clause was modified by an agreement that, in case the building should be erected substantially in accordance with the plans and specifications then submitted, the contract should be given to the lowest bidder among the five selected builders. The defendant contends that the committee only agreed to give the contract to the lowest bidder among the builders if any of their bids under that competition should be accepted, but that they did not surrender the right to reject all of the bids, and open a new competition. The plaintiff offered testimony tending to support his view, which was met

by testimony offered by the defendant tending to support the contrary view. This testimony was all submitted to the jury, under instructions to which no exception was taken; and their verdict sustained the view contended for by the plaintiff. * * *

The defendant further contends that the building committee were joint agents of the defendant, and that the four members who were present at the conference of March 15th could not execute the power which was delegated to the whole committee, consisting of five members, jointly. It does not clearly appear that this objection was taken at the trial, and it is not noticed in the charge of the presiding judge; but we have considered it. Where special agents are appointed to act jointly in the execution of a particular power, it has often been held that the action of all is necessary, in order to execute the power properly. This rule, however, is subject to many qualifications or exceptions. It is well understood that public agents may usually act by a majority. So, also, it has been settled that a majority of the directors of a corporation constitute a quorum, and a majority of the quorum may act. Sargent v. Webster, 13 Metc. (Mass.) 497, 504; Edgerly v. Emerson, 23 N. H. 555; Wells v. Rubber Co., 19 N. J. Eq. 402. Generally speaking, a committee of a corporation is subject to the same rules as the directors. State v. Jersey City, 27 N. J. Law, 493; Junkins v. School-Dist., 39 Me. 220. It would be very inconvenient in practice if a committee of this character, whose duties involve many acts in carrying out the general purpose of their appointment, could do nothing if a single member should be absent. There is sufficient precedent for holding that a majority may act, and such is the better rule. * * *

The remaining questions are whether there was sufficient evidence to warrant the second and third findings, or either of them; that such contract, if made by the committee, was approved by the directors, and was within the ostensible authority of the committee. If either of these was supported by the evidence, it is enough for the plaintiff's purposes; and most, if not all, of the evidence relating to the second finding bears also upon the third. The plaintiff contends that it was within the ostensible authority of the committee to fix the terms upon which it would receive bids, and to make the agreement which is embodied in the first finding of the jury, without any reference to an approval by the directors. He urges that this was within the ordinary province of a building committee; and that, in this instance, the directors knew that there was to be a competition for bids, that this competition was to be limited to five selected builders, and that the committee would fix the terms of it; that the directors were well aware that the committee were going on to attend to all these matters; that a vote had already been passed by the directors authorizing the committee to make leases in the new building; that they also knew that the architects had been selected; that the plans were hanging up in the office; that the erection of the new building was the most important subject which the board of directors or the Chamber of Commerce had under consideration during this period; that it was a subject of constant talk; that no director ever objected to the committee's undertaking to fix the terms of the competition

among the builders, or questioned its powers to do so, till after a letter from the plaintiff's attorney threatening an action at law. There was testimony in support of these various propositions. So far as appears, no one of the bidders doubted the power of the committee to act in the matter. The committee assumed to make changes in the terms of the competition at its own will. * * * It seems to us that the jury, as a result of the whole testimony, might properly come to the conclusion that the contract was within the ostensible authority of the committee, and that the bidders had a right to assume that the defendant would be bound by the contract of the committee as to the terms of the bidding. The doctrine as to the ostensible authority is thus stated in Bronson v. Chappell, 12 Wall. 681, 683 [20 L. Ed. 436]: "Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exists, in all respects as if the requisite power had been given in the most formal manner." Circumstances may warrant an inference that acts of a committee openly done, and extending over a considerable period of time, were known and assented to by those who appointed the committee. The directors represented the corporation; and if the directors knew, and by silence acquiesced in, the acts of the committee, that is enough. The vote of the stockholders would show what in the first instance was the actual authority of the committee, but the course of the directors might be considered in determining its ostensible authority. A secret or unknown limitation of authority imposed by the stockholders would not control an apparent authority from the directors, since the business was within the scope of the general authority of directors. This was clearly left to the jury by the presiding judge in terms to which the defendant did not except, and which appear to be unexceptionable. The decisions cited by the plaintiff afford various illustrations of the application of the rule of law as to apparent authority in an agent. The rule itself is not open to doubt. * * * The result is that there should be judgment for the plaintiff on the findings.

THAYER v. VERMONT CENT. R. CO.

Supreme Court of Vermont, 1852. 24 Vt. 440.

Book account. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows: The item in controversy is for sixty-two days work of three men and six horses and carts, at $7.50 per day—$465.00. The services, of the plaintiff embraced in this charge, were rendered in removing earth from section 18 to 19, and were necessary to make grade on defendants' road, there being an excess of earth on section 18, and a deficiency on section 19; that without this removal from section 18 to 19, this excess would have been wasted and the company obliged to borrow elsewhere. That S. F. Belknap was original contractor with said

Railroad Company, for the grading of said road throughout many sections, including sections 18 and 19; of which contract between said Belknap and said company the plaintiff had notice. That at the time plaintiff performed these services, he was to work under a contract, between himself and said Belknap, to grade said section 18, or a part of it. * * *

The plaintiff contracted with Belknap solely to do said work, and to their contract the defendants were not a party, in its inception. That while the work was in progress by the plaintiff, one Newell, who was an assistant engineer on said road, in the employ of said company, and whose business it was to overlook and make estimates of the work, told the plaintiff, if he would move said earth from section 18 to 19, he should have his pay for it; that the company would pay him for the same; that in pursuance of that direction of Newell, the plaintiff went on and performed the work; that the plaintiff had no contract for work on section 19; that the work was actually performed by the plaintiff, and was beneficial to the defendants; that had not the plaintiff made this extra haul from 18 to 19, the defendants would have been under the necessity of borrowing from elsewhere to fill up the space thus filled by the plaintiff's extra haul; that neither the plaintiff or any other person, has received pay for this extra work; that the same was undertaken and executed by the plaintiff, on the assurance of said Newell that he should be paid therefor by the company, that said Newell had no express authority to make such a contract. * * *

By the Court. The item in controversy in this case, is for sixty-two days work of three men and six horses and carts, at $7.50 per day, $465.00. This is claimed, as extra haul of dirt from one section of defendants' road, which plaintiff had contracted with S. F. Belknap to build, to another section, by direction of one Newell, an assistant engineer of the company, under the assurance that the company would pay the plaintiff for it. * * *

And it seems to us equally obvious, that Newell, could not bind the company by any such contract. If he could, so could all the engineers, and the defendants' position would be rendered somewhat perilous, and the restrictions in their written contracts would be of little avail. The auditor, it seems to us, entirely disposes of this; for he not only says, that this engineer "Newell had no express authority to make such a contract," but as has been before stated, that "no engineer had power to bind the company, by any contract for grading, or removing earth." This is too explicit to be evaded or overcome, unless we can see from the contract, or the relation of the engineers to the company, that the auditor has misconceived their power. * * *

And there is surely nothing in the general duties of an engineer, that would authorise him to employ others to do the work on the road, which by express contract belonged to the contractor to do. If he could do this, he might have rescinded the entire contract with Belknap, and let the work to others.

[The judgment for the defendant should be affirmed.]

GRAEF v. BOWLES et al.

Supreme Court of Oregon, 1926. 119 Or. 498, 248 P. 1090.

BURNETT, J. The plaintiff, an individual sues the three defendants as members of a partnership called the Northwest Bridge & Iron Company and declares that on June 14, 1920, the defendants, at that time engaged in the construction of 7 steel vessels, made a requisition upon him to furnish labor and material for the painting of those vessels, which he accepted. The requisition and acceptance are as follows:

"Northwest Bridge & Iron Company.

"Purchasing Department.

"Requisition No. 3717.

"Portland, Oregon, June 14, 1920.

"J. A. Graef, Portland, Oregon: Please ship the following material to Northwest Bridge & Iron Company, Jefferson street, Portland, Ore.

"Description.

"Furnish all material and labor for painting our hulls, known as 40–46, inclusive, using first-class materials in accordance with plans and specifications, and all work to be done subject to approval of our engineers and owner's representative.

"Price of this work to be $22,685 per boat, you to carry state insurance on all your men in the yard, and protect the Northwest Bridge & Iron Company from all claims, liens, etc.

"We reserve the right to purchase material for this work, or to designate where the material shall be purchased.

"This requisition is made in duplicate. Would ask you to please sign one and return.

"Distribution: Hulls 40–46, inclusive.

"Northwest Bridge & Iron Co.,
"[Signed] Ward C. Smith,
"Purchasing Agent.

"Accepted: J. A. Graef.
"No. 3717."

The execution of this paper by both parties is admitted. The complaint goes on to state, in substance, that at the time of the delivery and acceptance of the requisition, it was the custom of shipbuilding plants generally to require workmen employed therein to work only 8 hours per day and 5½ days per week, but, that for all work on any day over 8 hours or for work on Saturday afternoon or any time on Sunday, double the ordinary wages should be paid; that at the time of the execution and acceptance of said requisition, the defendants represented that in the construction of the vessels they would only employ a single shift of workmen, working 8 hours per day and 5½ days per week, and it was contemplated by both parties that plaintiff's bid for painting the hulls was based on the mutual understanding that only a single shift of men was to be employed 8 hours per day. The complaint further, in

substance, states that about March 1, 1921, the defendants, acting by and through their general superintendent, notified the plaintiff that it was necessary that work on hulls Nos. 43–46, inclusive, be speeded up, and demanded of the plaintiff and ordered him to furnish additional labor, and to order all his workmen to work overtime, stating that the defendants, upon submission of plaintiff's bill for extra expense by reason of paying overtime to his employees, would have said bill approved and would pay the plaintiff the additional costs thus incurred. Claiming that this imposed upon him an additional burden and relying upon that promise, the plaintiff did work his men overtime and was compelled and did pay to his employees $3,628.46 for overtime, which sum was the reasonable value thereof and, though demanded, the defendants have not paid the same. * * *

The case was tried before the circuit court and a jury. A verdict and judgment were rendered for the plaintiff and the defendants appeal. * * *

[Defendant contends that the court] erred in admitting in evidence a conversation said to have taken place between the superintendent of construction and the plaintiff after the work had progressed relating to speeding up the construction of the remaining four vessels. A Mr. Brown was the superintendent of construction referred to. He testified for the plaintiff that he was general superintendent in complete charge of construction for the defendant firm. There is testimony to the effect that the plant of the defendants was so arranged that all contracts for the furnishing of labor and materials used in the construction of vessels was to be made with the purchasing department. The plaintiff testifies [that this was known to him.]

The question principally for consideration at the present juncture is whether there was real or apparent authority in Brown to make a contract, either new or in modification of the admitted contract, to pay for overtime. * * *

It is a well-settled principle that one who deals with another as the agent of a third party does so at his peril. It is likewise a principle set forth in Portland v. American Surety Co., 79 Or. 38, 153 P. 786, 154 P. 121, cited by the plaintiff, that:

"As to third persons the principal is bound by the acts of his agent, not only when executed in pursuance of actual authority, but also in the scope of his apparent authority arising from the manner in which his principal has held him out to the public. Apparent authority and its effect vanish, however, in the presence of the actual knowledge of the third party as to the real scope of the agent's authority, or when the former has knowledge of facts which would put him upon inquiry as to the actual warrant of the agent."

What was the authority, as disclosed by the testimony, conferred upon Brown by the defendants with respect to speeding up the work? It is found solely in the testimony of Brown upon that subject. He said, as already quoted:

"Well, the instructions were to speed up and get the boats in the water just about as fast as we possibly could."

Certainly that does not contain any intimation that defendants intended to modify the existing contract or to make a new one. The agent would exceed his actual authority, even if this were all that was said upon the subject, if in relying on that as his warrant he promised that the defendants would pay for overtime. * * *

In brief, Brown had no authority, as disclosed by the testimony of the plaintiff, to make any contract modifying or superseding the original contract. [In the absence of actual authority, express or implied, a general superintendent in charge of construction has no power to alter the contract which it is his duty to see carried out. Superintendents of construction are in general the executors, and not the authors, of the contracts into which their employers enter. Plaintiff may be presumed to have known this; at any rate, there is here no evidence of circumstances justifying plaintiff in assuming that Brown had any authority to change or alter the contract.]

The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter a judgment in favor of defendants.

TEMPLIN et al. v. CHICAGO, B. & P. R. CO. et al.

Supreme Court of Iowa, 1887. 73 Iowa, 548, 35 N. W. 634.

ADAMS, C. J. The plaintiffs performed labor in laying a part of a track, and in doing other work, on a certain railroad in Iowa. They received payment in part, and bring this action to recover of the defendant the Chicago, Burlington & Pacific Railroad Company for an alleged balance, and to establish the same as a lien upon the road. The parties are not agreed as to who contracted with the plaintiffs to do the work, nor as to who owned the road at the time, nor as to who received the benefit of the work. The plaintiffs claim that the road was owned by the defendant the Chicago, Burlington & Pacific Railroad Company, and that that company contracted with them to do the work in question, and received the benefit of the work. The company, in its answer, denies all three of these propositions. Its counsel, in their argument, contend that the evidence shows that the road was owned by the defendant the Central Iowa Railway Company, and that the work in question was done for the Trunk Line Construction Company, a corporation organized under the laws of Connecticut and engaged in constructing railroads. The construction company is not made defendant.

It is conceded that the road was owned at one time by the defendant, the Chicago, Burlington & Pacific Railroad Company; but we think that the evidence shows that, before the contract sued upon was entered into, that company sold and conveyed the road by a duly-recorded deed to the defendant, the Central Iowa Railway Company. The court decreed a mechanic's lien against the latter company, but there is no pretense that the plaintiffs had any contract with that company. The contract not having been made with the company then owning the road, the plaintiffs could not acquire a lien as against that company unless they

were subcontractors. But the action is not brought upon that theory, nor is there any pretense that the requisite steps were taken to establish a subcontractor's lien. * * *

The defendants contend that the plaintiffs did not have a contract even with the company which once owned the road, but that their work was performed for the Trunk Line Construction Company, and that they have been paid for their work by that company, so far as they have been paid at all. The plaintiffs base their claim upon an alleged written contract, and that contract purports to be signed by one S. C. Cook, who was at the time the president of the Chicago, Burlington & Pacific Railroad Company, and the contract purports to bind that company. It is undisputed, however, that the company had at the time a contract with the Trunk Line Construction Company to do all the work in the construction of the road, including the work in question, and that the railroad company paid, or arranged for the payment of, the construction company for the same. If the Chicago, Burlington & Pacific Railroad Company must pay the plaintiffs for the work, it must pay for it twice. The evidence shows that, at the time the plaintiffs' contract was made, Cook was not only president of the railroad company, but superintendent of a part of the work for the construction company. As such superintendent, he had occasion to employ some one to lay the rails and do some other work. He accordingly employed the plaintiffs. For some reason, however, not very apparent from the evidence, he executed the written contract in the name of the railroad company, by himself as president. He undoubtedly thought that the construction company would pay promptly for the work according to the contract, and that no one would be injured; and we surmise that he was led into his irregular action by the supposition that the plaintiffs would prefer a contract with the railroad company. But it is not important to inquire how the irregularity occurred; the important question is as to whether the railroad company is bound by Cook's action. It is shown by undisputed evidence that Cook had no express authority to make such a contract in behalf of the company. Witnesses so testify, and there was no evidence, by introduction of the articles of incorporation or otherwise, tending to show to the contrary. There is no evidence that he had been accustomed to make such contracts in behalf of the company from which his authority could be inferred. He had not been held out by the company in any way particularly, and the plaintiffs were not justified in inferring that he had larger powers than those which he actually possessed; nor do we understand the plaintiffs as contending that he had been so held out. Their contention is, as we understand them, that he had such power simply by virtue of his office as president, and without any express provision therefor in the articles of incorporation, or authorization by the board of directors.

We have, then, the question, has the president of a railroad company the power, by virtue of his office simply, to let a contract in behalf of the company for the construction of its road, when the same is already under contract by the board of directors? No authority has been cited which so holds, and we conclude that such is not the law. In Taylor

on Corporations, § 236, the author says: "Virtute officii, a president has very little authority to act for his corporation, and can bind it only by such contracts as plainly come within its most ordinary routine of business;" citing Bank v. Hock, 89 Pa. 324; Blen v. Water Co., 20 Cal. 602; Risley v. Railroad Co., 1 Hun [N. Y.] 202. In Adriance v. Boone, 52 Barb. [N. Y.] 399, it was held that the officers of a corporation are special, and not general, agents; that there is no grant of power in the name by which they are designated; that they have no power to bind the corporation, except within the limits prescribed by the charter and by-laws; and that persons dealing with such officers are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon it contained in the charter and by-laws.

In our opinion the decree must be reversed.

PEOPLE ex rel. R. T. FORD CO. v. LEWIS et al.

Supreme Court of New York, Appellate Division, Fourth Department. 1913.
159 App. Div. 612, 145 N. Y. S. 862.[2]

[Application by the People of the State of New York, on relation of the R. T. Ford Company, a corporation, for mandamus against F. Park Lewis and others, constituting the Board of Managers of the New York State School for the Blind at Batavia, N. Y. From a judgment issuing a peremptory writ, respondents appeal. Reversed.]

FOOTE, J. Appellants, who are the board of managers of the New York State School for the Blind at Batavia, appeal from an order of the Special Term which awards to relator a peremptory writ of mandamus, requiring said board to pay or direct the payment to relator, in the form provided by law, of the sum of $16,385.60 and interest as part payment to relator upon the contract between the parties for the construction of a new building upon the grounds of said school.

The only question involved is as to the power of the State Architect to change the specifications of the contract as to the foundations of the building so as to substitute foundations made of Portland cement concrete for the blue Indiana limestone, with brick backing, required by the contract. This change was authorized and directed by the State Architect, without authority from the board of managers and without their knowledge, because of representations by relator that it would not be able to procure the Indiana limestone in time to permit erecting the foundations and exterior walls sufficiently early to allow the work of interior finishing to proceed during the winter, thus probably delaying the completion of the building beyond the contract date of June 4, 1913. After the change was authorized, but before relator began to construct the concrete foundation, the board of managers notified relator that it would not consent to such change, whereupon relator referred the matter to the State Architect, who instructed relator to proceed to erect the foundations in concrete, notwithstanding the objec-

[2] Statement of facts is omitted.

tions of the board of managers, and, in reply to communications from the board of managers on the subject objecting to such change, the State Architect stated in substance that he had authorized the change to avoid delaying the construction of the building; that he considered it within his jurisdiction to do so, and that the law did not require "minor changes of this nature" to be approved by the board of managers, but the intent of the law left such matters to the discretion of the State Architect. Relator decided to act on the assumption that the State Architect has authority to authorize the change in spite of the objection of the board and proceeded to build the foundations of concrete. On January 14, 1913, the State Architect certified to the board of managers that $16,385.60 had become due and payable to relator, being 85 per cent. of the work performed to that date, including the finished concrete foundations. The board has refused to make the necessary order or certificate to have this sum paid to relator by the state. The building has since been completed by relator. Meantime, a new State Architect has been appointed, who refuses to give relator any further certificates pending settlement between relator and the board in reference to the foundation walls, and relator has received no part of the $37,000 which by the contract it was to receive for erecting this building.

The inquiry, therefore, is whether the State Architect has the authority, by statute or by the contract between the board of managers and relator, to direct or allow relator to substitute a concrete foundation for the cut stone and brick foundation required by the contract, without the consent and against the objection of the board of managers, who are the parties to the contract with relator. * * *

We find nothing in the statutory provisions (defining the powers of the state architect) which confers upon (him) authority to himself make any substantial or material alteration in the contract for this building. He is a state officer and not an agent of the board of managers. His duty as state architect is, in the words of the statute, to "see that the material furnished and the work performed in constructing * * * such building are in accordance with such drawings and specifications, and that the interests of the state are fully protected"; and it is for this purpose only that he is to "supervise and control, as architect, the construction of all new buildings erected at the expense of the state." Architects employed by individual owners for the erection of buildings have not, by virtue of the nature of their employment, the power to consent to the alteration of a contract between the owner and the contractor, in the absence of (direct) authority from the owner.

[The court goes on to hold that there is nothing in the contract in this case which vests the state architect with such power, and concludes that, since neither in the statutory provisions nor in the express contract is the power given, it is wholly lacking.]

Order reversed, with costs, and motion denied. All concur.

HOWARD v. WINTON CO.

Supreme Court of California, 1926. 199 Cal. 374, 249 P. 511, 47 A. L. R. 1012.

PER CURIAM. Plaintiff instituted this action to recover $4,637.83 asserted to be owing to him for services rendered the defendant company as sales manager of its Los Angeles branch. Briefly, the complaint set forth that this sum was due under the terms of a written contract, dated October 20, 1919, alleged to have been executed by the parties to the action. The contract, a copy of which is incorporated in the complaint, specifies that the plaintiff is to receive, while serving as sales manager of defendant's Los Angeles branch, $175 a month, and, in addition thereto, 1 per cent. on all retail sales made by him and 10 per cent. of the net profits of said Los Angeles branch. It is alleged in the complaint that the net profits of said branch of the defendant company for the fiscal year ending October 31, 1920, during which time the plaintiff served as its sales manager, were $46,378.35.

At this point it may be well to state that the plaintiff received, while in the employ of the Los Angeles branch of the defendant company, a monthly check for $175 from the home office of the defendant company. He has made no attempt to recover 1 per cent. commission on any retail sales made by him personally. At no time during the conduct of this action has he made demand for any compensation other than the 10 per cent. of the net profits of the Los Angeles branch.

The copy of the contract appearing in the body of the complaint shows that it was not signed in the name of the defendant company, nor by any of its executive officers. It was, however, signed by one H. L. Owesney and by the plaintiff. The record points to said H. L. Owesney as manager of the Los Angeles branch of the defendant company. * * *

The case, therefore, reduces itself to a single proposition, namely, whether the general manager of a business may, in the absence of express and particular instructions, contract to distribute to an employee a share of the net profits of said business; or, in other words, is the general manager of a business clothed with implied authority to contract away the profits of the business?

Neither the research of counsel nor our own efforts have brought to light a California case passing upon the identical point here presented. The authorities are ample to the effect that a general manager has implied authority, within reasonable limits, to employ, discharge, and determine the compensation of employees. In addition, there are declarations, hereinafter quoted, to the effect that the execution of a contract disposing of a portion of the profits of a business is unreasonable, and not within the implied authority of the general manager of such business.

In 1 Mechem on Agency, pp. 711, 712, it is stated that: "A general manager, put in complete charge of a business in which servants, and the like, are ordinarily employed, would have implied authority, within the range of what is reasonable and proper, to employ the necessary

help. In doing so, he may make contracts of a usual and reasonable sort, such as, for example, the hiring of an employee for a year; or the assumption of the risk of the employee's competency to fill the position. He would not, on the other hand, have any implied authority to contract to give the employee, as part of his compensation, an interest in the principal's business or its profits." * * *

We are in accord with the rule enunciated in Mechem on Agency, supra, and Deffenbaugh v. Jackson Paper Mfg. Co., supra, [120 Mich. 242, 79 N. W. 197], and this whether or not its declaration in the latter was dictum. The rule that a general manager or superintendent may not, in the absence of express authority, contract to distribute to employees a portion of the profits of a business would appear to be dictated by sound business considerations. Were the rule otherwise, and should it be held that such power fell within the implied authority of a general manager or agent, it might be carried to unreasonable limits. And persons entering into contracts for a portion of the profits of a business should, for their own protection, make inquiry as to the actual authority of a general manager or agent in this respect. In the absence of such inquiry or of an estoppel or ratification, the principal should not be bound by the provisions of such a contract. * * *

For the reasons herein advanced, the judgment appealed from is affirmed.

GILLIS v. DULUTH, N. S. & S. W. R. CO.

Supreme Court of Minnesota, 1885. 34 Minn. 301, 25 N. W. 603.

BERRY, J. This is an action to recover pay for engineering services rendered by plaintiff and his minor son to defendant, and for money expended by plaintiff for defendant in connection therewith. That defendant is a railroad corporation, and that the services sued for were performed upon a line or route within the scope of its articles of incorporation, is undisputed. It is also undisputed that Tranah was one of the defendant's chief engineers, and as such employed by defendant "to survey and establish" the line of its road. It was also shown, without contradiction, that "a chief engineer is the superintendent of everything connected with the location and construction of the road." There was also competent evidence tending to show that, assuming to act as such chief engineer, Tranah employed plaintiff to perform, and procure to be performed, the services, and to make the expenditures sued for. That Tranah did thus in fact employ the plaintiff was not disputed in evidence, but the defendant insisted, and introduced what was equivalent to evidence tending to show, that Tranah and a partner took of defendant a contract "to survey and establish" the line of defendant's road, and "supervise the construction thereof," at the price of $1,000 per mile; themselves paying, as we understand it, the expenses of so doing; and that they had no authority to make any contract by which defendant would be bound to pay any part of such expenses.

Now, upon the foregoing state of the evidence, admissions, and un-

disputed facts in the case, and upon the further evidence as to the performance of the services and the making of the expenditures sued for, there would seem to be no doubt that the jury was warranted in finding for the plaintiff. The jury were at liberty to find that, prima facie, Tranah's employment as defendant's chief engineer, "to survey and establish" its line, clothed him with apparent authority to employ, on behalf of defendant, such subordinates, and incur such expenditures, as were reasonably suitable to that end, and such as the evidence tended to show plaintiff's services and expenditures to have been (Hooker v. Eagle Bank, 30 N. Y. 83; Crowley v. Genesee Min. Co., 55 Cal. 273); and there was no evidence introduced to show that the alleged special employment of Tranah and his partner to do the surveying, etc., for a gross sum per mile, they paying all expenses thereof, was ever communicated to plaintiff. And it follows that the jury were at liberty to find that defendant was bound by Tranah's action in the exercise of his apparent authority in employing plaintiff, and authorizing him to make necessary expenditures. Authorities supra.

These conclusions appear to us to dispose of the case; for, in view of the admitted and undisputed facts above mentioned, the many exceptions taken to the testimony as to who the defendant's directors were, and what they said and did, becomes unimportant. Tranah's apparent agency is made out without any dependence upon that testimony, and by defendant's own admission. If there was any error in receiving that testimony, it cannot have substantially prejudiced the defendant, as there is nothing further in the case which appears to us to demand special consideration here.

The order denying a new trial is affirmed.

SPECIAL CASE WHERE THE PRINCIPAL IS A PUBLIC CORPORATION

The doctrine of liability of the principal for acts done by an agent, outside the scope of his real authority, but within his apparent power, does not extend to cases where the principal is a public corporation. Here all parties are put on notice of the actual limit of the agent's authority. In other words, as to a public corporation there is no doctrine of apparent powers of an agent.

McDONALD v. MAYOR, ALDERMAN AND COMMONALTY OF THE CITY OF NEW YORK.

Court of Appeals of New York, 1876. 68 N. Y. 23, 23 Am. Rep. 144.

Appeal from order of the Supreme Court reversing a judgment in favor of plaintiff entered upon a verdict, and granting a new trial.

[This action was brought to recover the contract price for gravel and stone delivered to the department of roads of the city of New York upon

the order of the superintendent of roads. The city interposes the defense that, since the superintendent did not act in accord with the statutory requirements, there can be no liability, inasmuch as his real authority depends upon such compliance, and he has no apparent authority since all persons dealing with a municipal corporation through an agent are presumed to know the extent of the agency.]

FOLGER, J. The plaintiff * * * does not * * * prove * * * that a necessity for the purchase or use of the materials was certified to by the head of the department of public works, or that the expenditure therefor was authorized by the common council (Laws of 1857); * * * nor did he aver or prove in terms, that a contract for the purchase of the materials was entered into by the appropriate head of department, upon sealed bids or proposals, made in compliance with public notice advertised. * * * The existence and stringency of these statutory provisions are recognized by plaintiff's counsel, but the force of them is sought to be avoided. It is urged, that the object of the expenditure was proper, as it is part of the defendants' corporate duty to keep public ways in repair; that the material was delivered to the superintendent of roads, an official of the defendant, charged with carrying that duty into practical effect; and that the plaintiff had reason to believe that the superintendent was acting within the line of his duties. The first two of these propositions may be admitted; the third may not be. Doubtless, to the apprehension of the plaintiff, the superintendent was so acting, as to do work which it was the duty of the defendant to cause to be done. But we see nothing in the case which brought to his mind, so as to create a belief, that there had been a contract made for the material, as above indicated, or that the necessity for the expenditure had been certified to and authorized, as required by law. And though the superintendent of roads had certified to be correct, the bills for the materials, rendered by the plaintiff, this did not meet the letter of the statute laws.

Such certification did not precede the reception of the material; nor was the certification by the head of the department; nor was the taking and use of the material, nor payment for it, authorized by the common council. Nor can it be that the provisions of the statute, are alone for the instruction of the department and officials of the defendant. They were a restraint upon them, but upon other persons as well. They put upon all who would deal with the city, the need of first looking for the authority of the agent with whom they bargain. Quite clearly do they impose upon the paying agent of the defendant a prohibition against an unauthorized expenditure. And are they not also a restraint upon the municipality itself? They are fitted to insure official care and deliberation, and to hold the agents of the public to personal responsibility for expenditure; and they are a limit upon the powers of the corporation, inasmuch as they prescribe an exact mode for the exercise of the power of expenditure.

It is said that the plaintiff had a right to presume, that the agents of the defendant transacted their business properly, and under sufficient authority. Does not this involve, also, that the plaintiff had a right to

presume, that it was the business of the superintendent of roads to purchase material for the city upon the credit of the city, and that he had authority so to do? This cannot be maintained. It is fundamental, that those seeking to deal with a municipal corporation through its officials, must take great care to learn the nature and extent of their power and authority. * * *

Judgment affirmed.

MILLER et al. v. GOODWIN et al.

Supreme Court of Illinois, 1873. 70 Ill. 659.[3]

SCHOLFIELD, J. * * * The general principle of law is settled, beyond controversy, that the agents, officers, or even city council, of a municipal corporation, cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being, in terms, authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid ground. The inhabitants are the corporators—the officers are but the public agents of the corporation. Their duties and powers are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule, that the corporation is bound only when its agents or officers, by whom alone it can act, if it acts at all, keep within the limits of the chartered authority of the corporation. * * * It results from this doctrine, that unauthorized contracts are void, and, in actions thereon, the corporation may successfully interpose the plea of ultra vires, setting up, as a defense, its own want of power, under its charter or constituent statute, to enter into the contract. * * *

The decree of the court below will be affirmed.

Decree affirmed.

BOUTON et al. v. BOARD OF SUPERVISORS OF McDONOUGH COUNTY.

Supreme Court of Illinois, 1877. 84 Ill. 384.

Mr. Chief Justice SHELDON delivered the opinion of the court.

[This was an action by N. S. Bouton & Co. on an alleged contract made between the defendant county through its agents, Myers and Reid, superintendents of construction of the county court house, whereby the plaintiff Bouton was promised the agreed price if he would go ahead and complete his portion of the construction. It appeared from the evi-

[3] Statement of facts is omitted.

dence that Wallbaum & Co., general contractors, entered into a contract with the board of supervisors of the defendant county to erect a court house for the said county for the price of $129,000; that the plaintiff, Bouton, was a subcontractor who agreed with Wallbaum & Co. to furnish certain material and work, for about $25,794, which was performed, and on which they were paid only $8,059, leaving $17,734 still due, which they here seek to recover from the county. It appeared further that after Bouton had performed a portion of the work under his subcontract Wallbaum had become in default in payments due, and Bouton refused further performance, whereupon Myers and Reid, the superintendents in charge of construction appointed by the county board of supervisors, agreed to withhold fifteen per cent. of the sums due Wallbaum & Co. and upon the completion of the work by Bouton to pay out of the said fifteen per cent. the sum due him; that he consented, on this basis, to go on with the remainder of the work.] After this arrangement, Bouton & Co. furnished and put into the building from $15,000 to $18,000 of work and material. * * * If the county itself had made this agreement a very strong case * * * would be exhibited. It is presented in argument, all through, as though the county was a party to the arrangement, through its superintendents. Therein consists the defect.

We consider the arrangement as one which it was not within the scope of the authority of Reid and Myers to make, and that it was not binding upon the county. The contract for building the court house was not made by them, but by the board of supervisors of McDonough county. Reid and Myers were but superintendents of the construction of the building, to see that it was built according to the contract which had been made by the board of supervisors. All the authority given by the contract to Myers and Reid, the superintendents, was to accept or reject any materials or work furnished, and to issue the certificates for the work and materials done and furnished, and upon such certificates, by the resolution of the board of supervisors, the county clerk was directed to issue court house orders, in favor of Wallbaum & Co., for such sums of money as they might be entitled to in accordance with the terms of the contract. The board's resolution of appointment of Reid was, "as county agent to superintend the construction of the court house."

Reid and Myers had nothing to do with the disbursement of funds, and it was not theirs to say when, to whom, or how much, money should be paid. In respect, then, of this transaction of October 21, 1870, Reid and Myers were not the authorized agents of the county, or either of them, and they must be regarded as speaking for themselves as to whatever they might do in virtue of the authority vested in them. They did not speak for or bind the county. * * *

[It appears that the county did in fact reserve the fifteen per cent., but later made use of the whole of it in the completion of the building after the failure of Wallbaum & Co., and so had none left with which to satisfy the claim of Bouton. Bouton complains that three other subcontractors made similar arrangements for their pay direct from the county, and that they were duly paid by the county. This is true, save

for the fact that the arrangements were not at all similar to Bouton's. These three sub-contractors appealed directly to the board of supervisors for a promise of direct payment, and the board itself, in due form, promised direct payment to them if they would go ahead and complete their contracts. The promise here was not made by the superintendents of construction on behalf of the board, but by the board direct.]

"The powers of a county, as a body politic, can only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted." Laws 1861, p. 236, sec. 4, art. 13. * * * [Myers and Reid, the superintendents of construction, had no authority to vary the terms of the contract between Wallbaum & Co. in any respect, and anything they may have done or said inconsistent therewith, was beside the authority given them, and cannot bind the county.] It is a seeming hardship that Bouton & Co., who happened to be non-resident subcontractors, living in Chicago, should go unpaid, when three other resident subcontractors, through an arrangement subsequently made, secured from the county the pay for not only their future work, but for some previous work. But this was owing to their superior vigilance in going to the board of supervisors themselves—the body authorized to act for and bind the county—and obtaining from them an absolute agreement to pay for such work, by their acceptance of orders for payment of its amount. Had Bouton & Co. adopted the same precaution, they would have been paid also. The county have paid the full contract price of $129,000 for the building of the court house, and it would be unjust to the county to require it to pay the further sum here claimed beyond such contract price. * * *

SECTION 2.—PRINCIPAL'S LIABILITY IN CONTRACT—DOCTRINE OF UNDISCLOSED PRINCIPAL

1. In General

Where a person has contracted with one who was at the time acting for an undisclosed principal, and later discovers the fact and the identity of the principal, he may hold either the agent personally or the undisclosed principal. That is, suppose that an architect, secretly acting for and at the orders of an owner, contracts in his own name with a builder for materials and labor, the builder, upon discovering the principal may hold him liable on the contract. The builder may of course hold the architect liable on the contract, since it was upon his credit that the builder contracted. The only way in which any agent may escape personal liability on a contract into which he enters in behalf of another is to disclose his principal and the fact of his agency. But by this doctrine of undisclosed principal, the third party contractee may *also* have a remedy against the principal.

The principle upon which the undisclosed principal is held liable upon discovery is subject to certain important exceptions which are illustrated in the following cases.

2. Exceptions to the Doctrine of Undisclosed Principal

(1) Election to Hold Agent

LINDQUIST v. DICKSON.

Supreme Court of Minnesota, 1906. 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729, 8 Ann. Cas. 1024.

Action by August Lindquist against Ella M. Dickson. There was a verdict for plaintiff, and from an order denying motion for a new trial, defendant appeals.

Start, C. J. Action to recover from the defendant, as an undisclosed principal, for labor and material performed and furnished by the plaintiff in decorating and repairing her house, pursuant to an alleged contract made for her by her husband, Joseph M. Dickson. The complaint alleged, in effect, that, at the time the contract was entered into with the husband he was in fact acting as agent for his wife, the defendant, but he failed to disclose to the plaintiff the fact of such agency, or the fact that she was the real party in interest and owned the house, the decorating and improvement of which was the subject-matter of the contract; that the plaintiff performed the contract on his part; that he was not paid therefor; and that he commenced an action against the husband to recover the balance due him on the contract, and on August 29, 1904, he recovered judgment against him for the sum of $273.68, no part of which has been paid; and further that thereafter (in the month of October, 1904) the plaintiff learned for the first time that the defendant was the real party in interest, and that the contract was made for her by her husband as her agent. This action was commenced in the month of June, 1905. * * * The trial resulted in a verdict in favor of the plaintiff for the amount stated, and the defendant appealed from an order denying her motion for a new trial. * * *

It is not controverted that the plaintiff, at the time the contract was made, understood that the house he was to decorate and improve belonged to the husband, and that he was dealing with him as principal, and further that he recovered judgment against the alleged agent upon the same claim which is the basis of this action, in ignorance of such alleged agency. It is the contention of the defendant that such judgment is a bar to this action.

The general rule is that, where a simple contract, by parol or writing, is made by an authorized agent without disclosing his principal, and the other contracting party subsequently discovers the real party, he may abandon his right to look to the agent personally and resort to the principal. * * * But whether the creditor can proceed against the undiscovered principal, after he has obtained a judgment on his claim against the agent, is a question as to which the adjudged cases are conflicting. In the case of Kingsley v. Davis, 104 Mass. 178, the creditor, after being fully informed that the party with whom he made the contract was acting for an undiscovered principal, brought an action against

the agent and recovered judgment for his claim. Afterwards he brought an action against the principal to recover for the same claim, and the court held that the action against the principal could not be maintained for the reason that: "The general principle is undisputed that, when a person contracts with another who is in fact an agent of an undisclosed principal, he may upon the discovery of the principal resort to him or to the agent with whom he dealt at his election. But if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot afterwards resort to the principal." In Beymer v. Bonsall, 79 Pa. 298, it was held that nothing short of satisfaction of the judgment against the agent would discharge the principal.

The case of Kingsley v. Davis suggests the true basis for solving the question. It is a question of election. Election implies full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice. * * * We therefore hold upon principle, and what seems to be the weight of judicial opinion, that: If a person contracts with another, who is in fact an agent of an undisclosed principal, and, after learning all the facts, brings an action on the contract and recovers judgment against the agent, such judgment will be a bar to an action against the principal. But an unsatisfied judgment against the agent is not a bar to an action against the undiscovered principal when discovered, if the plaintiff was ignorant of the facts as to the agency when he prosecuted his action against the agent. * * *

Order affirmed.

GREENBURG v. PALMIERI.

Supreme Court of New Jersey, 1904. 71 N. J. Law, 83, 58 A. 297.

VAN SYCKEL, J. This is a suit instituted in the * * * district court of Newark against the wife for supplies purchased by her husband for horses owned by her. The plaintiff, before this suit was brought, sued the husband, and recovered a judgment for the same claim. After judgment against the husband, the plaintiff learned that the husband, in making the purchases, acted as the agent of his wife in her business, and then this suit was commenced. From the judgment recovered against the wife, the case is in this court by appeal.

In Elliott v. Bodine, 59 N. J. Law, 567, 36 A. 1038, Judge Nixon, in delivering the opinion of the court of last resort, says: "Where credit is given to an agent, the fact of the agency being unknown at the time, the party giving credit may elect [after learning of the existence of the principal] which he will hold responsible, the principal or the agent; and that a husband may act as the agent of his wife." * * *

To make an election binding, the party electing must have information of the name of the principal, in addition to the fact of the agency, for in the absence of such knowledge there could not be an election. In this case the plaintiff had notice neither of the agency nor of the name of the principal.

If the plaintiff sues after he is advised of the agency, it is an election, from which he cannot recede; but where, as in this case, he recovers a judgment against the agent when he is in ignorance of the existence of a principal, an action will lie against the principal, unless he discharges the judgment against the agent. Story Ag., § 296; Mech. Ag., §§ 695–700; Beymer v. Bonsall, 79 Pa. 298.

The judgment below should be affirmed, with costs.

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(2) Exception in the Case of Promissory Notes

WEBSTER v. WRAY.

Supreme Court of Nebraska, 1886. 19 Neb. 558, 27 N. W. 644, 56 Am. Rep. 754.

COBB, J. * * * The point upon which the rehearing was allowed, and upon which we think the case turns, is that while in the case of contracts, generally, where one of the persons executing the same executes it in his own name, without disclosing any one as his principal or his own character as an agent, if in point of fact he was acting as the agent of another party, such other party will be held to be the real party to the contract, yet that this rule does not apply to negotiable promissory notes. This question was ably argued at the bar, as well as by exhaustive briefs by counsel on either side. An examination of the authorities cited by counsel, with others referred to therein, led us all, at the consultation, to the conclusion that the above proposition as to both its branches expresses the law correctly. Being about to enter upon a collation of authorities upon this point of the nonliability of an unnamed principal upon negotiable paper, my attention was attracted to a citation on page 284, 1 Daniel, Neg. Inst., to an article in 13 Alb. Law J. No. 19, May 6, 1876, p. 323. This article I find so exhaustive of the subject that I will content myself by giving the conclusions of the writer, and the authorities by him cited. Says our author: "But as to bills of exchange and promissory notes, it has been long settled that he who takes negotiable paper contracts with him who, on its face, is a party thereto, and with no other person. By Lords Abinger and Parke, Beckham v. Drake, 9 Mees. & W. 92, 96; Byles, Bills, 37; Story, Bills, § 76; Edw. Bills, 80." Hence evidence is not admissible to charge any other person thereon upon the grounds of his having been the copartner or principal of the party named. Metc. Cont. 108; Draper v. Massachusetts Steam-Heating Co., 5 Allen [Mass.] 340. The rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue on a negotiable instrument, can be shown by parol evidence, (Fuller v. Hooper, 3 Gray [Mass.] 334, per Metcalf, J.,) even as between the immediate parties to the transaction, and although an agency is disclosed upon the face of the instrument, where the word "agent" or something equivalent is added to the signature of the

party signing the instrument. * * * It is held that although the party executing the instrument describes himself as "agent," yet, if the name of the principal is not disclosed upon the face of it, all evidence dehors the instrument, for the purpose of holding him thereon, is to be excluded. It is wholly immaterial, therefore, that the agent had full authority to make it in behalf of his principal; that the consideration was exclusively received for his benefit; that the plaintiff knew the agent's principal, and accepted the note as the promise of the principal. * * *

Upon reargument and reconsideration of the authorities, we reach the conclusion that the district court erred in admitting evidence on the trial introduced by the plaintiff for the purpose of showing that T. B. Webster executed and delivered the promissory notes, set out in the first and third causes of action in the amended petition of the plaintiff in said court, as the agent or partner of E. D. Webster, and in holding said E. D. Webster thereon. The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

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(3) Exception in the Case of Contracts Under Seal

WALSH v. MURPHY et al.

Supreme Court of Illinois, 1897. 167 Ill. 228, 47 N. E. 354.

CARTWRIGHT, J. The appellate court reversed a decree, obtained by appellant in the circuit court of Cook county, establishing a mechanic's lien in his favor against premises which appellees purchased after the lien was claimed to have attached to the property. The cause was not remanded, and appellant has brought the case here, asking a reversal of the judgment of the appellate court, and an affirmance of the decree of the circuit court in his favor. Annella Rood was the owner of the premises when the contract was made and the material and labor furnished by appellant. She commenced to construct an apartment building on the property through the agency of her husband, Francis D. Rood, and on March 1, 1893, appellant and said Francis D. Rood entered into a written agreement, of that date, under their hands and seals, by which appellant covenanted and agreed to superintend, manage, and carry on the plumbing, gas fitting, and sewering for the building, to buy all material in his own name, and contract for all labor, and Francis D. Rood covenanted and agreed to pay appellant 7½ per cent. on the total cost of all labor and material used in said plumbing, gas fitting, and sewering, and to pay for all the material and labor. The instrument did not purport to be entered into on behalf of Annella Rood, the owner of the premises, nor did the fact of her ownership or her husband's agency appear in any manner in it, but it purported to be made and entered into by him as principal. Aside

from the form of the instrument, appellant in fact dealt with Francis D. Rood as principal and owner of the property, and did not learn that Annella Rood was the owner until after he quit work, when he ascertained the fact by his solicitor's examination of the abstract of the record. * * *

If Annella Rood was a party to this contract as an undisclosed principal, so as to give a right of action against her then appellant was entitled to a lien; but if it was not a contract with her, then the judgment of the appellate court was right. The rule in regard to instruments under seal made by an agent is that, in order to bind the principal and to make it his contract, it must purport on its face to be his contract, and the seal must purport to be his. An agent cannot ordinarily bind the principal by a sealed contract executed in his own name, nor can the principal ordinarily avail himself of such a contract and sue the other contracting party thereon. An undisclosed principal, whose authorized agent has made such a contract in his behalf, can neither sue nor be sued on it. Story, Ag. §§ 147–154, 160. * * * This rule was laid down in this state as early as 1827 in Mears v. Morrison, Breese, 223. In that case William Morrison was sued on an instrument under seal signed "Guy Morrison, Agent," and dated June 17, 1818, by which he sold to William Mears, plaintiff, the time that a negro girl named Harriet and her children had to serve the defendant William Morrison, she being a daughter of a servant of said Morrison, indentured under the laws of the territory of Illinois concerning the indenturing of slaves. The trial court arrested the judgment upon the ground that the instrument declared on created no liability on the defendant, William Morrison. This was held to be right, because the covenant was that of Guy Morrison, the agent, and the seal was not the seal of William Morrison. * * * In Campbell v. Jacobson, supra [145 Ill. 389, 34 N. E. 39], where the appellant sought to establish a mechanic's lien on the land of Fanny Jacobson under a sealed contract made by Morris Jacobson, her husband, it was intimated that the wife could not be held liable as an undisclosed principal, but the cause was decided on other grounds.

A different rule prevails as to contracts not under seal, and as to such contracts, if the nature and circumstances of the transaction show an intention to bind the principal, and not the agent, effect will be given to such intention. The fact that the contract made by Francis D. Rood would have been valid without a seal, and that therefore the authority to execute it might be by parol, is immaterial. * * * No lien is created except by statute, and there could be none unless this contract was with the owner; and, as we have seen, this contract was not with the owner. She could not have had any right of action upon it against appellant for a failure to perform it, or on account of the manner of its performance, nor could any action be maintained against her under it. It follows that there was no lien acquired, and the judgment of the appellate court will be affirmed. Affirmed.

(4) Exception Where Undisclosed Principal Has Paid Agent

(5) Exception Where Agent Exceeded His Actual Authority

FRADLEY v. HYLAND.

Circuit Court of the United States, S. D. New York, 1888. 37 F. 49, 2 L. R. A. 749.

Libel by one Fradley against Hyland for supplies furnished one Gibson, respondent's agent in charge of a canal boat. Decree for libelant as to the first cause of action, and respondent appeals.

WALLACE, J. The libel sets forth two causes of action for supplies purchased by one Gibson. * * * The facts which appear in evidence are these: During the period in which the supplies were purchased, one Gibson, who was the owner, and was managing certain canal boats of his own, was employed by the appellant, to manage certain canal boats for the latter. Gibson was to obtain employment for the boats, and return the net earnings monthly to appellant, after paying for all repairs and supplies, and deducting his own commissions. His instructions were not to obtain supplies upon credit, but, if not in funds from the earnings, to call upon the appellant. Monthly settlements of account took place between Gibson and the appellant, in which Gibson was allowed all items for supplies paid or contracted for by him against the earnings of the boats, and a considerable fund was always left in his hands by the appellant. Gibson ceased to act as appellant's agent September 1, 1886. The supplies were sold to him prior to that time. The libelant supposed that Gibson was the owner of all the boats he was managing, and dealt with him as such, selling him supplies for all indiscriminately, charging the price to him, and taking his notes from time to time, or those of one Isham, his clerk. The claim to recover the part of these supplies used on appellant's boats is the first cause of action set forth in the libel. * * *

[The appellant] insists that he is not liable as a principal for the supplies sold to his agent by the libelant, under the circumstances of the case. The general rule is familiar that, when goods are bought by an agent, who does not at the time disclose that he is acting as agent, the seller, although he has relied solely upon the agent's credit, may, upon discovering the principal, resort to the latter for payment. But the rule * * * is subject to the qualification stated by Lord Mansfield in Railton v. Hodgson, 4 Taunt. 576: * * * "that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller, where he has looked to the responsibility of the agent." * * * This case decides that the principal is not liable * * * if he has in good faith paid

the agent at a time when the seller still gave credit to the agent, and knew of no one else. [In this case Hyland had fully paid his agent Gibson.]

[Further, here another circumstance controls.] In the present case Gibson had no authority * * * to make a purchase upon the credit of the appellant. * * * Very different considerations govern the case in which an agent who assumes to represent a disclosed principal buys of a seller upon credit, and one in which the agent assumes to be acting for himself, and the seller deals with him, and gives him exclusive credit, supposing him to be the only principal. * * * [In the latter case] the seller does not rely upon any ostensible authority of the one with whom he contracts to represent a third person, he can only resort to the third person as principal, and charge him as such, when the purchase is made by one having lawful authority to bind the third person. * * * "When the agency is not held out by the principal by any acts or declarations * * * in regard to the particular act or business it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent beyond what he has * * * authorized, because he has not misled the confidence of the other party who has dealt with the agent." Story, Ag. § 133. * * *

The libel is dismissed, with the costs of this court and of the District Court.

SECTION 3.—PRINCIPAL'S LIABILITY IN CONTRACT—DOCTRINE OF RATIFICATION

1. In General

Even where the agent has contracted with a third person on behalf of his principal in relation to that which is outside the scope of his real or apparent authority, the principal will yet be liable where he has ratified the unauthorized act. Ratification by the principal consists of his approval and adoption of the unauthorized contract as his own act.

MEMPHIS & CHARLESTON R. R. CO. v. SCRUGGS.

Supreme Court of Mississippi, 1874. 50 Miss. 284.

Peyton, C. J., delivered the opinion of the court.

This is an appeal from a decree of the chancery court of Alcorn county, enforcing the specific performance of an award.

The material facts of the case are, that on the 7th day of July, 1857, the Memphis and Charleston Railroad Company, and J. W. Scruggs

entered into a contract, by the terms of which said Scruggs was to build a hotel on the grounds of the said company at Corinth now in Alcorn county, to be used as an eating house for said road. The said J. W. Scruggs was to erect the buildings and make the other improvements at his expense, and pay the said railroad company two hundred and fifty dollars per annum, for the use of the ground occupied by said improvements. He was to keep a first rate eating house, satisfactory to the company, and if the company should become dissatisfied with the character of the house kept, then they were to have the right to pay to the said J. W. Scruggs the value of his improvements at the time, and take possession of the property; and in case said Scruggs should become dissatisfied with the schedule of the road or its management, then he was to have the right to give up the said improvements, and require the said company to pay him their value at the time of such surrender. In either case, the property to be valued by disinterested parties. The said Scruggs was to board all the officers and employees of said company at the usual and customary rates charged by other eating houses on said road, and this contract was to be binding on both parties so long as mutually agreeable.

Some time after the making of said contract, * * * it became agreeable to both parties that the said property should be surrendered to the said company, on the payment of the amount due the said * * * Scruggs for the value of the said property under the contract. But the parties being unable to agree as to the construction of said contract, and upon the amount of the value of said property to be paid upon the surrender thereof to said company, on the 24th day of February, 1871, the said parties entered into a written agreement to refer the construction of said contract and the amount to be paid for said property * * * and award of R. C. Brinckell, R. O. Reynolds and F. L. Pledge, and the amount so fixed by the award, was, by the terms of the agreement of submission, to be a lien on said property.

On the 20th day of April, 1871, the arbitrators met at the Scruggs House, in the town of Corinth, and the parties appearing by their counsel, and after hearing the contract and the agreement of submission read and the evidence offered by the parties, and the arguments of counsel, did award, order and decree in writing, that the said railroad company pay to the said Narcissa Scruggs the sum of thirty-one thousand six hundred and sixty-six 66-100 dollars on the surrender of said property. * * *

It is contended by counsel for appellants that M. J. Wicks, the president of the Memphis and Charleston Railroad Company, had no authority to enter into the submission on behalf of said company. We think * * * the appearance of the appellees before the arbitrators, by their agents and counsel without objection to the reference, amounts to a ratification of the act of the agent, and estops them from making any objection to the submission after the award was made. Where the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully, to all intents and purposes, as if he had orig-

inally given him direct authority in the premises, to the extent which such acts, doings or omissions reach. Story on Agency, 283, § 239.

At common law, however, there is a distinction between the ratification of acts which are void and the ratification of those which are voidable. In the former case, the ratification is inoperative for any purpose whatever; in the latter, full validity is given to the acts. Acts which are illegal, immoral or against public policy fall within the former class. For, in such cases, the original contracts or acts being void, ought not to be allowed to acquire any validity from their being subsequently confirmed; since the same noxious qualities adhere to the ratification as exised in the original transaction. But whatever may be the force of this distinction in the former class of cases, properly understood, it is not applicable to cases of agency, where a party assumes to act, not for himself but for another, without any authority whatsoever, or by an excess of the authority delegated to him, in cases where the principal may lawfully do the act. In all such cases, if the principal subsequently ratifies the act, he is bound by it, whether it be for his detriment or for his advantage. And a ratification once deliberately made, with full knowledge of all the material circumstances, cannot be recalled. Story on Agency, § 242.

As the corporation may lawfully be a party to a submission to arbitration, and as this can be effected only through an agent, it follows that the submission of the agent, although it may be in excess of authority, may be ratified by the corporation, as well by its acts as by express confirmation. And this we think was done by its appearance before the arbitrators by its agent and attorney, without objection to the authority of the arbitrators. This conduct and act on the part of the railroad company was a recognition of the authority of the arbitrators, and amounted to a ratification thereof. * * *

NATIONAL IMP. & CONST. CO. v. MAIKEN et al.

Supreme Court of Iowa, 1897. 103 Iowa, 118, 72 N. W. 431.[4]

DEEMER, J. The individual defendants, who are the promoters and stockholders of a corporation known as the Moravia Canning Factory Company, entered into a written contract with the plaintiff, a copartnership, by which it undertook to build and to equip a canning factory in the town of Moravia, in Appanoose county, Iowa. By the terms of this contract, the plaintiff undertook to build and erect the factory according to certain plans and specifications, and to equip it with certain machinery, which was described in the contract, for the consideration of $6,950, to be paid when the factory was completed and in operation. * * *

[Suit in equity to recover the contract price for erecting a canning factory for the defendants at Moravia, Iowa, and to establish and fore-

[4] Statement of facts is omitted.

close a mechanic's lien against the property upon which the factory was erected. The defendants] plead that a dispute arose between the parties to the contract as to whether it had been fully complied with by the plaintiff, and that negotiations leading to a settlement of the matters in dispute were had between the defendants and an agent of the plaintiff, which finally resulted in a compromise by which plaintiff agreed to accept $4,000 in full of its claims under the contract; that defendants accepted the proposition, paid the $4,000, and received back the contract, together with a conveyance of the property and receipts in full to each of defendants for their liability under the contract. The plaintiff admits the settlement made by Silvers, but says he had no authority except to receive payments under the contract, which the defendants well knew; that, after receiving the money from the agent, it repudiated and rescinded his action, because of lack of authority and of fraud practiced upon him by the defendants, and offered to return the money received, and demanded the return of the property; that the defendants refused to return the property, and plaintiff thereupon credited the amount (less a small sum which was allowed some of defendants for soliciting stock) to defendants' account, which is the credit it refers to in its petition. * * *

That an agent for the plaintiff went to Moravia, met the defendants, and did in fact settle this claim, is conceded. But plaintiff insists that he had no authority to do so, and that it rescinded and repudiated the settlement as soon as it learned of it, and, after such repudiation, demanded of defendants the return of the contract, and a reconveyance of the property. The actual authority conferred upon this agent is evidenced by a power of attorney, the material parts of which are as follows: "Know all men by these presents that National Improvement and Construction Company, of the city of Chicago, county of Cook, in the state of Illinois, has made, constituted, and appointed, and, by these presents, does make, constitute, and appoint, J. B. Silvers, of the city of Chicago, county of Cook, and state of Illinois, true and lawful attorney for it, and in its name, place, and stead to receive and receipt for any and all sums of money due it at Moravia, Iowa, and to give its own receipt therefor." Of this the defendants had knowledge. Silvers claimed, however, that he had full authority to settle and adjust the claim. Relying upon this claim, and believing in his authority, defendants made the settlement pleaded by them in their answer, and received the documents as therein stated. Silvers returned to Chicago, and reported his settlement to the plaintiff, giving full information as to what he had done. Thereupon plaintiff sent defendants a written notice, in which it recited its claim under the contract, and, further, gave notice that it refused to ratify or justify his (Silvers') acts, and that it had deposited in the Lake Street Manufacturing Block, in the city of Chicago, to the order of A. D. Maiken, of Moravia, Iowa, the sum of $3,935; that it demanded a surrender of the factory, and the possession of the original contract and the power of attorney executed to Silvers. * * * Now, it must be conceded that Silvers did not have authority to settle the dispute between these parties. He assumed

to possess this power, however, and defendants paid him relying upon the truth of his claim. He received the money, delivered up the contract, conveyed the property to the defendants, delivered them his power of attorney, and took the money received in settlement with him to Chicago. When he arrived there, he reported his doings to his principal. As soon as they were advised as to what he had done, they attempted to repudiate and rescind his action, and the controlling question in the case is whether or not they did rescind.

The well-settled rule of law is that, when an agent transcends his power, his principal, upon being informed of the transaction, must repudiate or rescind the same within a reasonable time, or he will be held to have ratified the act. It is also elementary that a principal cannot ratify a part of the agent's unauthorized acts, and reject the remainder. The rule has thus been stated in the case of Bryant v. Moore, 26 Me. 84: "There is no doubt that if one person knows that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property, or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it. * * * If, for instance, a merchant should authorize a broker, by a written memorandum, to purchase certain goods at a price named, and the broker should exhibit it to the seller, and yet should exceed the price, and this should be made known to the merchant when he received the goods, if he should retain or sell them he would ratify the bargain made by the broker, and be obliged to pay the agreed price." And in the case of Benedict v. Smith, 10 Paige, 126, the court, in discussing a question ruled by the same principle as the one at bar, said: "* * * But where one person assumes to act as the agent of another, without authority, the person for whom he assumes to act cannot claim the benefit of his agency in part only, and reject it as to the residue of the transaction. And where the attorney of record goes beyond his general power in compromising or taking security for a debt intrusted to him for collection, if the client, upon being informed of the transaction, does not dissent without any unreasonable delay, the court may presume the attorney had a special power thus to act; especially where the client receives the benefit of the securities taken for him by the attorney." Appellant recognized this rule of law, and, in giving the notice to which we have referred, attempted to repudiate the transaction; and the real question is whether or not it did so. It gave notice of the repudiation, and demanded the return of the property and of the papers delivered to the defendants, but the only return it made of the money was to deposit it to the order of the president of the canning company, in a building in Chicago, with notice that, if the property and papers were not returned and the money accepted, it would credit it upon defendants' account. Having received the money from the defendants at Moravia, it was the duty of plaintiff, in case it desired to rescind, to offer the same back to them at that place. Defendants were not required to go to Chicago or to any other place to get it. It had come into the possession of plaintiff through the acts of its agent,—unauthorized though they may have been,—and

it was its duty to tender the same back to the defendants at the place where received. * * *

As the plaintiff did not restore the money collected by Silvers on the faith of the settlement, but, on the contrary, accepted it, and undertook to apply it on the defendants' account, it cannot be heard to say that the acts of its agent were not authorized. Defendants were not compelled to act under the notice given them by the plaintiff until their money was returned, or offered to be returned, at Moravia, Iowa. An offer to deliver it to them at Chicago was not sufficient, unless, possibly, they or some of them authorized to receive it were present in Chicago when the tender was made. * * *

The ultimate question here is the authority of the agent. He was not, as we have seen, expressly authorized to make the settlement. He, however, assumed to do so, and his principal accepted the benefits thereof with full knowledge of what had been done. Having ratified the acts of its agent, the transaction was the same in law as if expressly authorized. * * * As the account was fully settled by plaintiff's agent, it is not entitled to recover. Affirmed.

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2. Requisites of a Ratification

(A) Principal Must be Disclosed—Undisclosed Principal Cannot Ratify

WILLIAMS v. STEARNS et al.

Supreme Court of Ohio, 1898. 59 Ohio St. 28, 51 N. E. 439.

[Action by Williams against Stearns & Hoover to recover for materials sold and delivered. Defendants were engaged as contractors in constructing the Columbus & Short Line Railroad. It appeared from the evidence that one Harmon was purchasing agent for the defendants, and that one Brooks was in their employ, in connection with and under Harmon, "to solicit lumber and timber for defendants in the construction of the said railway, and to draw written orders and bills in favor of the sellers of such lumber and ties upon Harmon for his acceptance and payment thereof"; that Harmon and Brooks came to the plaintiff and represented that they had a contract with the defendants to furnish material for the construction of the railroad, and Harmon made arrangements with plaintiff to sell him material on his own credit. It appears further that defendants, Stearns & Hoover, have paid their agent Harmon for the materials furnished by the plaintiff, although plaintiff has never received any payment therefor. It is the theory of plaintiff's suit that defendants are liable for the act of their agent on the ground that they have ratified his unauthorized act by the retention of the materials plaintiff furnished.]

Shauck, J. * * * The error in treating the transactions testified to by these witnesses as ratifications is obvious. There can be

no ratification by an alleged principal unless authority to represent him has been assumed by the alleged agent. It is of the essence of ratification that the principal confirms and adopts as his own an act done without his previous authority. In the transaction testified to by these witnesses, Harmon and Brooks did not assume to act as agents for the defendants. To the contrary, their representation was that they were purchasing materials on their own account to fill their contract with the defendants. * * *

[The judgment below for the defendant will be affirmed.][5]

(B) Knowledge of the Facts by the Principal Essential to Ratification

BOHANAN v. BOSTON & M. R. R.

Supreme Court of New Hampshire, 1901. 70 N. H. 526, 49 A. 103.

The plaintiff's evidence tended to prove that he was injured in 1896, while working for the defendants, and released them from liability on account of his injury, in consideration of the promise of John H. Brown, their claim agent, that they would give him $500 and furnish him steady employment during good behavior. They paid the money, and furnished him some work for two or three years, but have failed to give him steady employment. Brown told the plaintiff on the day of the settlement that he was authorized to make it, and talked in regard to it with one Mooney, who was employed by the defendants to hire the train men and arrange the running of the trains on the Concord division of their road. Later, the plaintiff complained to Mooney that the defendants were not doing as they agreed by him, and Mooney said he would see that the plaintiff had what belonged to him, and for a short time thereafter he was given steady work. A nonsuit was ordered at the close of the plaintiff's evidence, and he excepted.

YOUNG, J. The contract of an agent binds his principal only (1) when he authorizes his agent to make it, (2) when he gives the person dealing with his agent reason to believe that he has authorized it, and (3) when he ratifies it.

The testimony of the plaintiff's witnesses as to what Brown said respecting his authority when he made this settlement was inadmissible to prove that he was authorized to make it; for an agent's authority to make a particular contract cannot be proved by showing that he said he was authorized to make it; so there was no direct evidence of Brown's authority to act for the defendants. The only facts shown which tended to prove that he had such authority were their holding him out as their claim agent, and recognizing this settlement so far as to pay the

[5] There is about an equal division of authority on the question involved in Williams v. Stearns. See article by Goddard, "Ratification by an Undisclosed Principal," 2 Mich. Law Rev. page 25.

money he promised, and to furnish work for a time. Although these facts tend to prove that he was authorized to promise money and work for a limited time in settlement of such claims, they have no tendency to prove that he was authorized to promise anything else; * * *

There is no evidence that the plaintiff had a right to believe that Brown was authorized to make this settlement; for the only thing the defendants are shown to have done which tended to prove that Brown had any authority to act for them was to hold him out as their claim agent. Giving this fact the construction claimed for it by the plaintiff, Brown was their general agent to settle claims. The duties of a claim agent are not prescribed by law, and it is not a matter of common knowledge that they are intrusted with greater authority than other general agents. Such agents are only clothed, as a matter of law, with authority to employ the usual and ordinary means of accomplishing that for which the agency was created. * * *

There is no evidence that the defendants have ratified this settlement. Paying the money Brown promised, and furnishing a part of the work, did not amount to a ratification, unless they knew, or ought to have known, when they did so, that Brown's promise to give the plaintiff steady employment constituted a part of the consideration for this settlement; for a principal only ratifies such of the unauthorized acts of his agents as he adopts with a knowledge of all the facts essential to an understanding of his rights. Gould v. Blodgett, 61 N. H. 115, 120; McDonald v. Insurance Co., 68 N. H. 4, 38 A. 500. There is no evidence of such knowledge here; for, excepting Brown, Mooney is the only one of their servants who is shown to have known of the settlement. The knowledge of an agent is the knowledge of his principal in regard to such matters only as come within the scope of the agent's employment. It follows that the defendants are not charged with Mooney's knowledge, unless it was a part of his duty to settle such claims. The only evidence respecting his duties was the testimony that he employed the help and attended to running the trains on the Concord division of the defendants' railroad. The fact that he performed these duties, has no tendency to prove that settling claims was any part of his business, for it is neither an incident of the business of hiring help nor of running trains; nor is it a matter of common knowledge that an agent for these purposes usually has such authority. It is clear that Mooney's promise to give the plaintiff what belonged to him is not competent evidence of a ratification of this settlement unless there was other evidence from which the jury could find that he was authorized to employ men for life; for ordinarily an agent cannot ratify a contract he could not make. The only evidence respecting Mooney's authority to hire help was the fact that he hired them for the Concord division of the defendants' railroad. Giving this evidence the construction most favorable for the plaintiff, Mooney was their general agent to hire help, and clothed with authority to make such contracts of employment as railroad corporations usually and ordinarily make with their employés. But this will not help the plaintiff, for there is no evidence that such corporations ever employ servants for life.

The defendants are not trying to set up this settlement as a defense to an action to recover damages for the plaintiff's injury, but he is seeking to enforce it. So the question of whether they can keep its benefit and escape its burden is not here. Exception overruled.

(C) Principal Cannot Ratify an Act Which He Had No Power to Do Originally

ZOTTMAN v. CITY AND COUNTY OF SAN FRANCISCO.

Supreme Court of California, 1862. 20 Cal. 96, 81 Am. Dec. 96.

[Action against the city of San Francisco upon a contract alleged to have been made with it. It appeared that the council of the city had authorized certain improvements to be made under a contract with the plaintiff. After the work was started, it was discovered that changes were necessary involving extra expense, and a special committee, appointed to look after the work, together with other city officials, directed the changes to be made. These changes were known to all the members of the legislative body of the city and were a matter of general approval. They did not however, take any formal action upon it. The city paid the bill for the original contract but now refuses to pay for the "extras." At the trial the defendant had judgment.]

FIELD, C. J. [After deciding that the authority to make such contracts was vested in the legislative body of the city, and that it could make such contracts only by ordinances:] Individual members of the common council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this; the common council even could not by any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general and applies to the corporate authorities of all municipal bodies; where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale; indeed there is no power to sell in any other way. Aside from the mode designated there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications. Thus in Head v. Providence Insurance Co., 2 Cranch,

156, 2 L. Ed. 229, Mr. Chief Justice Marshall, in speaking of bodies which have only a legal existence, says: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe the mode, or the instrument no more creates a contract than if the body had never been incorporated." See McCracken v. City of San Francisco, 16 Cal. 619; Farmers' Loan & Trust Co. v. Carroll, 5 Barb. [N. Y.] 649; New York Firemen Ins. Co v. Ely, 5 Conn. 568, 13 Am. Dec. 100.

As a necessary consequence flowing from these views, a contract not made in the prescribed mode, cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instances; and a power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing originally. We had occasion, in the case of McCracken v. City of San Francisco, to give to this subject great consideration, and we there held, that where authority to do a particular act can only be exercised in a particular form or mode, the ratification must follow such form or mode, and that a ratification can only be made when the principal possesses at the time the power to to do the act ratified. * * *

"By the charter the power is limited and it is a familiar rule that corporations can only bind themselves by contracts they are expressly or impliedly authorized to make. It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard. * * * An individual having power to make a contract may ratify or affirm it, when made by one who without authority assumes to be his agent, but if the individual have himself no such power, he can no more bind himself retroactively to its performance by affirmance or ratification than he could have done so prospectively in the first instance. The power to ratify ex vi termini

implies a power to have made the contract, and the power to ratify in a particular mode implies the power to have made the contract in that manner." * * *

Judgment affirmed.[6]

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3. Ratification of the Contract Makes the Principal Liable Also For All Incidental Torts

DEMPSEY v. CHAMBERS.

Supreme Judicial Court of Massachusetts, 1891. 154 Mass. 330, 28 N. E. 279. 13 L. R. A. 219, 26 Am. St. Rep. 249.

This was an action to recover for an injury to the plaintiff's building, the injury consisting in the breaking of a light of plate glass in the front of said building. The plaintiff claimed that the glass was broken by * * * one McCullock, while he was engaged in delivering a load of coal to the plaintiff, which had been ordered by the plaintiff of the defendant, who was a dealer in coal. The defendant claimed, and offered evidence * * * to show, that at the time of the delivery of the coal McCullock was not his servant or in his employ, and undertook to deliver the coal without his direction or knowledge. It appeared that McCullock was a member of the defendant's household, accustomed to be in and about the defendant's coal yard, and that he took the coal from the defendant's yard and on one of the defendant's wagons. It also appeared at the trial, that, subsequent to the delivery of the coal and with a full knowledge of the accident and of the delivery of the coal by McCullock, the defendant presented a bill for the coal to the plaintiff, and claimed that the plaintiff owed him for the same. The court found as a fact that the glass was broken by the carelessness of McCullock in delivering the coal, and that at the time of the delivery of the coal McCullock was not in fact the agent or servant of the defendant, or in his employ, but found that the delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal. * * * To this ruling the defendant * * * excepts. * * *

The case was tried by the court without a jury, and the finding of the court was for the plaintiff.

Holmes, J. This is an action of tort to recover damages for the breaking of a plate glass window. The glass was broken by the negligence of one McCullock, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this

[6] The concurring opinion of Cope, J., is omitted.

finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock became responsible for his negligence in the delivery of the coal." * * * The only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code today, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seems to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "fained to be all one person" by a fiction which is an echo of the patria potestas and of the English frankpledge. * * * Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. * * *

The question remains whether the ratification is established. As we understand the bill of exceptions, McCullock took on himself to deliver the defendant's coal for his benefit and as his servant, and the defendant afterwards assented to McCullock's assumption. The ratification was not directed specifically to McCullock's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCullock's employment that the defendant would have been liable as master if McCullock really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. * * * The ratification goes to the relation, and establishes it ab initio. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. * * * In Coomes v. Houghton, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

SECTION 4.—PRINCIPAL'S LIABILITY IN TORT—SCOPE OF EMPLOYMENT

1. In General

The principal is liable for torts committed by the agent so long as the agent was at the time acting within the scope of his employment; and the said scope of employment includes all acts, rightful or wrongful, committed in the furtherance of the principal's business.

STAPLES v. SCHMID et al.

Supreme Court of Rhode Island, 1893. 18 R. I. 224, 26 A. 193, 19 L. R. A. 824.

Douglas, J. The jury have substantially found in this case that the defendants' salesman, erroneously suspecting the plaintiff of having stolen a package of spoons from the store, which was in his charge, detained her, sent for a police officer, and caused her to be sent to the police station, and there searched, and they assessed the damages to the plaintiff in the sum of $750. The defendants bring their petition for a new trial, alleging that the verdict is against the evidence, that, if the facts were as found, the defendants are not liable and that the damages are excessive.

The questions of law involved are raised by exceptions to the refusal of the presiding judge to rule as requested by the defendants, and by exceptions to the charge as given. The proposition upon which these exceptions are based, and which the defendants contend is established by the cases they cite, is that, as a matter of law, it is not within the scope of the employment of a salesman left in charge of a store to cause the arrest and search of a person whom he believes to have stolen property from his custody.

The general rule defining the liability of a master for the acts of his servant is thus laid down in Wood on Master and Servant, § 279: "For all acts done by the servant under the express orders or direction of the master, as well as for all acts done in the execution of his master's business within the scope of his employment, the master is responsible, but when the act is not within the scope of his employment, or in obedience to the master's orders, it is the act of the servant, and not of the master, and the servant alone is responsible therefor." The principle of the rule is stated by Andrews, J., in Rounds v. Railroad Co., 64 N. Y. 129, 21 Am. Rep. 597. * * *

It is not contended that this general rule is not settled by reason and authority, but the defendants say that the acts here complained of were not within the scope of their agent's employment. It is obvious that in most cases the question is one of fact. What are the limitations of an agent's or a servant's authority depends generally upon the things he is to do, the object he is set to accomplish, the degree of discretion

which the position where he is placed and the exigencies of the occasion reasonably call for. * * *

Two principles seem to be recognized by the [authorities on this question]: First, that when a servant not specially appointed to protect property arrests a person whom he supposes to have stolen his master's goods, the servant must be presumed to have acted in pursuance of his duty as a good citizen, and not in the scope of his employment as a servant. * * * Second, that [the law will not infer] that a master has authorized his servant to do an act which he could not lawfully do himself in the circumstances supposed by the servant to exist. * * *

It remains to apply these principles to the case at bar. The servant in this case was left with an assistant in charge of his master's store. His ordinary duties undoubtedly were to show goods, and to sell them to customers. It was, however, equally his duty to protect his master's property from pilfering. The acts complained of were evidently done with that intention. *The arrest was for the purpose of searching for and recovering the master's property, not with the object of punishing crime against the public.* The establishment was not a railroad station where the multiplicity of employees confines each one to a narrow round of duties, where special officers are stationed to preserve order and detain criminals, nor a large dry goods emporium, where detectives and watchmen are employed to guard against thieves. *The servant here was salesman and custodian in one.* Whatever the master might do in the protection of his property he expected his servant to do in his absence. If the servant had seen the plaintiff take up and secrete the package of spoons in question, and had allowed her to walk away with them unmolested, could any one say that he had not been derelict in his duty to his master? If, in the performance of this duty, he mistook the occasion for it, or exceeded his powers, or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master.

We conclude, therefore, that the directions asked by the defendants were rightly refused, and that the charge correctly stated the law of the case. * * *

ILLINOIS CENT. R. CO. v. LATHAM.

Supreme Court of Mississippi, 1894. 72 Miss. 32, 16 So. 757.

WHITFIELD, J. Accepting the plaintiff's testimony as true, it appears that he was riding on top of the coach to avoid the payment of his fare, and did not go back to the caboose because he feared the conductor would say something. He got on at Memphis to go to Sardis. The fare was $1.50. The brakeman did not demand $1.50, but 50 cents; he did not eject him when the demand for 50 cents was first made and declined, and not until the transit was nearly terminated. Under the rules introduced by plaintiff, and as explained by Homer Williams, a witness for plaintiff, it would have been the duty of the

brakeman to report to the conductor the presence of plaintiff on the train, and act, as to his ejection, under the conductor's orders. The brakeman made no report to the conductor whatever, but acted independently of him. Failing to get the money,—the 50 cents—he cursed the plaintiff, and shoved him off the moving train. Surely, in no just and reasonable view can it be held that in the acts of the brakeman, thus done, was he acting in his master's business, or with intent to perform any duty due to the master. He was not demanding "fare," but money to put in his pocket. He did not eject him under the orders of the conductor, nor when—aside from any orders of the conductor—he first discovered him, nor at the next station. He was plainly attempting to extort money for his private use. * * *

The question here is whether the brakeman, in doing what he did, as he did it, was acting for the company or in the accomplishment solely of his own independent, wilful, malicious, and wicked purposes, using his authority to eject trespassers, if any there was, as a mere cover under which to extort money from appellee, not for fare, but for his pocket? The case of Kansas City Ft. S. & G. R. Co. v. Kelly in 14 P. 173 is clearly a case where the injured boy was ejected from the train as a trespasser, simply to get him off, as being improperly on the train, in execution of what the court held the implied duty of the brakeman to eject trespassers. Manifestly, in that case the brakeman acted in discharge of what he deemed a duty to the company. There was no hint in that case of any act done by the brakeman for his own private benefit, or to gratify even private malice. * * *

It is true that ordinarily the question whether the brakeman's act was within the line of his duty, done for the master and in his business, is one of fact, for the jury, since ordinarily there is conflict in the evidence. But in this case, on the plaintiff's own testimony, the court should have granted the [motion for a directed verdict for the defendant railroad company. Manifestly in this case the brakeman was acting outside the scope of his employment.]

Reversed.

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2. Assaults Committed by the Agent

SINGER SEWING MACH. CO. v. PHIPPS.

Appellate Court of Indiana, 1911. 49 Ind. App. 116, 94 N. E. 793.

Ibach, J. Appellee, Nellie Phipps, brought this action in the Floyd circuit court to recover damages for an alleged assault and battery committed upon her by appellant's agent, Louis J. Beach.

The facts briefly are as follows: Susan Read, the mother of appellee, leased a sewing machine from the appellant company under a written agreement of conditional sale. This agreement gave the appellant the right, if default in payment was made, to regain possession of the machine, without recourse to law. The evidence shows that Mrs. Read

made default in payment, and that she kept her outer door locked to prevent the sewing machine agent entering to take the machine. The agent kept watch of the premises, and when one Kraft, the probation officer of Floyd county, entered her house to see appellee, Beach and another agent of appellant entered. To prevent them from removing the machine, appellee seated herself upon it. The assault and battery complained of was made, as alleged, by appellant's agent, Beach, tipping the machine and raising one end of it from the floor, thus throwing appellee to the floor; and, in consequence of the injuries suffered, after three weeks she gave premature birth to a child. [The jury found for the plaintiff and assessed her damages in the sum of $1,000. Defendant appeals, denying liability on the ground that their agent acted outside the scope of his authority in committing the assault.]

In the case before us the agent was authorized to enter the home of appellee and take possession of the machine in question; the appellant thereby permitted him to determine the manner and method of obtaining such possession, and it is therefore responsible for his misjudgment or misconduct; and, if he used such force as to injure appellee in carrying out the object or regaining the machine in question, that being the purpose of going to her house, the result of such conduct will fall upon appellant. * * *

[Judgment for plaintiff affirmed.]

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3. Deviations from the Course of the Employment

FLEISCHNER v. DURGIN.

Supreme Judicial Court of Massachusetts, 1911. 207 Mass. 435, 93 N. E. 801, 35 L. R. A. (N. S.) 79, 20 Ann. Cas. 1291.

Rugg, J. The plaintiff while in the exercise of due care and traveling on Dartmouth street opposite the Public Library in Boston was injured by the negligence of one Freeman, who was driving the defendant's motorcar. Freeman was not in the general employ of the defendant, but on the day in question had been asked by him to drive the car from the Stevens garage in the town of Brookline to the shop of one Burlingame, also in Brookline and less than a mile away, for some repair. Later in the day Freeman took the car, drove first to Coolidge Corner, a square in Brookline, not on the way to the Burlingame shop, where he had lunch. Then with a friend he drove the car about six miles further out of the way from the garage to the Burlingame shop to a shop in Boston for the purpose of getting a chain for his own uses. He had started to return to Brookline and was bound for the Burlingame shop when the accident occurred. The defendant gave no directions to go to Coolidge Corner or to Boston, and this ride was taken without his knowledge. Freeman had worked at the Stevens garage where the defendant kept his motor car, and once

before had driven it to Boston, but under what circumstances does not appear.

The principles which govern the rights of the parties are settled. The master is liable for the act of a servant in charge of his vehicle when the latter is acting in the main with the master's express or implied authority, upon his business and in the course of the employment for the purpose of doing the work for which he is engaged. The master is not liable if the servant has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation or in connection with the doing of the master's work. Under this rule the employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment and upon comparatively insignificant deviations from direct routes of travel, but within the general penumbra of the duty for which he is engaged. Hayes v. Wilkins, 194 Mass. 223, 80 N. E. 449, 9 L. R. A. (N. S.) 1033, 120 Am. St. Rep. 549.

The employment of Freeman was limited to a specific and short trip within a town. He took the car several miles out of the way, which was six or seven times as far as he had a right to go, to a crowded part of a large city on an errand wholly of his own, and had only just commenced to return at the time the act occurred for which damages are sought in this action. He was acting in disregard of his instructions, and wholly outside his employment, and for a purpose having no relation even remote to the business of the master. The extent of the excursion which he undertook on his own account was so disproportionate to the length of the route he was authorized to go that it cannot be minimized to a deviation. It was in fact the chief journey. There is nothing to indicate that the defendant had any hint or ground for suspicion of this unwarranted use of his property. Under such circumstances he cannot be held liable. McCarthy v. Timmins, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; Story v. Ashton, L. R. 4 Q. B. 476; Mitchell v. Crassweller, 13 C. B. 237.

Exceptions overruled.

RILEY v. STANDARD OIL CO. OF NEW YORK.

Court of Appeals of New York, 1921. 231 N. Y. 301, 132 N. E. 97, 22 A. L. R. 1382.

ANDREWS, J. Driving directly towards his master's mill, his master's truck loaded with his master's goods for which his master had sent him, his only purpose to deliver them as his master had commanded, with no independent object of his own in mind, Million, a chauffeur employed by the defendant, ran over the plaintiff, negligently, as the jury have said with some evidence to support their finding. Therefore the complaint should not have been dismissed, unless we can say as a

matter of law that at the moment of the accident this chauffeur was not engaged in the defendant's business. We reach no such conclusion.

There could be no debate on this subject were not the essential facts obscured or modified by other circumstances. It appears, however, that the chauffeur had been ordered to go from the mill to the freight yards of the Long Island Railroad, about 2½ miles away, obtain there some barrels of paint, and return at once. After the truck was loaded, Million discovered some waste pieces of wood. He threw them on the truck, and on leaving the yards turned, not towards the mill, but in the opposite direction. Four blocks away was the house of a sister, and there he left the wood. This errand served no purpose of the defendant, nor did the defendant have knowledge of or consent to the act of the chauffeur. Million then started to return to the mill. His course would lead him back past the entrance to the yards. Before he reached this entrance, and when he had gone but a short distance from his sister's house, the accident occurred.

A master is liable for the result of a servant's negligence when the servant is acting in his business; when he still is engaged in the course of his employment. It is not the rule itself but its application that ever causes a doubt. The servant may be acting for himself. He may be engaged in an independent errand of his own. * * *

No formula can be stated that will enable us to solve the problem whether at a particular moment a particular servant is engaged in his master's business. We recognize that the precise facts before the court will vary the result. We realize that differences of degree may produce unlike effects. But, whatever the facts, the answer depends upon a consideration of what the servant was doing, and why, when, where, and how he was doing it.

A servant may be "going on a frolic of his own, without being at all on his master's business." He may be so distant from the proper scene of his labor, or he may have left his work for such a length of time, as to evidence a relinquishment of his employment. Or the circumstances may have a more doubtful meaning. That the servant is where he would not be had he obeyed his master's orders in itself is immaterial, except as it may tend to show a permanent or a temporary abandonment of his master's service. Should there be such a temporary abandonment the master again becomes liable for the servant's acts when the latter once more begins to act in his business. Such a reentry is not affected merely by the mental attitude of the servant. There must be that attitude coupled with a reasonable connection in time and space with the work in which he should be engaged. No hard and fast rule on the subject either of space or time can be applied. It cannot be said of a servant in charge of his master's vehicle who temporarily abandons his line of travel for a purpose of his own that he again becomes a servant only when he reaches a point on his route which he necessarily would have passed had he obeyed his orders. He may choose a different way back. Doubtless this circumstance may be considered in connection with the other facts involved. It is not controlling.

We are not called upon to decide whether the defendant might not have been responsible had this accident occurred while Million was on his way to his sister's house. That would depend on whether this trip is to be regarded as a new and independent journey on his own business, distinct from that of his master, * * * or as a mere deviation from the general route from the mill and back. Considering the short distance and the little time involved, considering that the truck when it left the yards was loaded with the defendant's goods for delivery to its mill and that it was the general purpose of Million to return there, it is quite possible a question of fact would be presented to be decided by a jury. At least, however, with the wood delivered, with the journey back to the mill begun, at some point in the route Million again engaged in the defendant's business. That point, in view of all the circumstances, we think he had reached. * * *[7]

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4. Distinction Between Agents and Independent Contractors

The test as to whether the contract is one of agency or independent contract seems to be whether the employer retained control of the means by which the result is to be obtained, or whether the result alone was contracted for. If the latter, it is a case of independent contract. If a tort is committed by an independent contractor, rather than by an agent, ordinarily the employer is not liable to the third person injured; although there may be circumstances, as referred to in the cases following, where even here there may be liability.

LAWRENCE v. SHIPMAN et al.

Superior Court of Hartford County, Connecticut. 1873. 39 Conn. 586.

Seymour, J. * * * The plaintiffs were respectively tenants of the defendants, occupying a brick building called the Russ Place, which the defendants owned as trustees in fee, situate on the west side of Main street, in the city of Hartford. The plaintiffs aver that while they were thus occupying the tenement on the 13th day of July, 1869, and for several days next previous thereto, the defendants carelessly and negligently excavated and removed, and caused to be excavated and removed, the earth and foundation from under the south wall of said tenement, and did thereby remove the necessary support of said wall, and on said day had negligently and carelessly made and caused to be made the excavation and removal aforesaid, without providing other necessary support of said wall, and had negligently omitted to shore

[7] The dissenting opinion of McLaughlin, J., in which Hiscock, C. J., and Chase, J., concur, is omitted.

up said wall as aforesaid, although warned by the plaintiffs of the danger, whereby the wall sank and fell and the whole building was demolished, and the plaintiffs' goods of great value were destroyed.

There is no serious conflict of testimony. Indeed most of the facts are agreed to. The relation of the parties to each other is as stated in the writ. One Duffy owned the premises south of and adjoining those of the defendants, and he had pulled down a tenement on his lot in order to rebuild. Neither building had a cellar. Duffy had made considerable progress in digging a cellar on his lot, when he had a communication with the defendants proposing that they should join him in building a party wall of stone under the south wall of the defendants' tenement. Duffy's proposition was favorably entertained, and resulted in a verbal contract with a builder and mason by trade, to remove the earth from under the south wall of the defendants' tenement and underpin it with stone. He was to furnish everything needed for the job. The stone structure was to be laid eight feet below the sidewalk and was to extend the depth of the defendants' building, and was to be two and a half feet in thickness, nine inches being on Duffy's land and one foot nine inches on the defendants' land. The price agreed on was $500, one half to be paid by Mr. Duffy and one half by the defendants. The defendants and Duffy were the contracting parties on one side and the mason on the other. The defendants did not have, nor were they by the terms of the contract to have, any oversight or direction of the job. They relied on the skill and experience of the mason to do the work properly, carefully, and according to his contract.

The contractor commenced his work about the 12th of July, undermining at first about nine feet of the defendants' wall and immediately began filling up the gap with stone. On the 13th he continued his stone work, but unfortunately and unadvisedly he undermined the wall at another place before the first gap was filled and thus weakened the foundation, so that at about half-past three o'clock in the afternoon of the 13th of July, the whole building tumbled into a mass of shapeless ruins. The occupants barely escaped with their lives, saving none of their property. * * *

The first question suggested is, whether this negligence of the mason can in law be imputed to the defendants. If he was their servant his carelessness is in law theirs. If, on the other hand, he was merely a contractor, acting as such in an independent business, they are not under the general rule of law liable, though they may even then under certain circumstances be held responsible. Whatever obscurity may heretofore have rested upon the distinction between servant and contractor, it is now established law that such a distinction exists, and the elements which distinguish the one from the other by the modern decisions have been determined with considerable approach to exactness and accuracy, though it must be admitted that in some instances the distinction is nice and difficult. In this case it is to be noticed:

1. That the mason was employed in a single transaction at a specified price for the job.

2. By the terms of the contract he was to accomplish a certain specified result, the choice of means and methods and details being left wholly to him.

3. The employment was of a mechanic in his regular business, recognized as a distinct trade, requiring skill and experience, and to which apprenticeships are served.

4. The contractor's duty was to conform himself to the terms of the contract, and he was not subject to the immediate direction and control of his employers.

These circumstances by all the authorities indicate a contractor in contradistinction from a mere servant, and the defendants cannot in my judgment be subjected for the negligence of the contractor, upon the basis of the relation of master and servant. But it was suggested in the argument that as the contractor was at work on the defendants' property, by their procurement and for their benefit, and being selected by them, natural justice requires that they should bear the consequences of his negligence rather than the plaintiffs, who are innocent sufferers, having had no agency whatever in the transaction which caused the loss.

These suggestions are not without a show of reason, and their force is fully admitted in the law as applicable to a certain class of cases.

1. If a contractor faithfully performs his contract, and a third person is injured by the contractor, in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for negligences of the contractor, not done *under* the contract but in *violation* of it, the employer is in general not liable. It is not claimed here that the injury to the plaintiffs arose from the due *performance* of the contract. On the contrary, it resulted from the *breach* of the contract, by the contractor not doing his work with suitable care.

2. If I employ a contractor to do a job of work for me which in the progress of its execution obviously exposes others to unusual peril, I ought, I think, to be responsible upon the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. The case now before me could not, however, I think, come under this head. The peril, whatever it was, was mainly to the defendants' own tenement, and cannot be treated, notwithstanding the unfortunate event, as one at all imminent to the plaintiffs.

3. If I employ as a contractor a person incompetent and untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. This, too, has no application to the case before me. But the plaintiffs claim that the same principle is applicable to the employment of a person pecuniarily irresponsible, and evidence was received, subject to objection, that the contractor was destitute of property; and I am called upon to decide the effect of this fact. I am not prepared to say that this fact may not be of some weight where the work to be done is hazardous to others. If a person having an interest in a job which naturally exposes others to peril, should attempt to shield himself from responsibility by contracting with a bankrupt mechanic, I think the employers might be subjected for damages

done by the contractor, but, as before stated, the work to be done by the contractor involved no peril in its usual performance, and I cannot hold the defendants liable under this claim. * * *

I therefore award that the defendants are not guilty in manner and form as alleged.

There are other cases than those mentioned in which the employer is liable for the negligence of his contractor, but they have no special application to the matter before me. I will barely allude to them. It has always been understood that if the negligence creates a nuisance the employer is liable. * * * So if the contract is to do an unlawful thing, the employer as well as the contractor is liable for the damage done in the execution of the contract. There was formerly a doubt whether the owner of real property could be protected from liability caused by work upon it by a contractor, but it is now settled that real and personal property stand upon the same footing in this respect. * * *

NEW ORLEANS, MOBILE & CHATTANOOGA R. CO. v. HANNING.

Supreme Court of the United States, 1872. 15 Wall. 649, 21 L. Ed. 220.

[The defendant company entered into a contract with one Carvin for the construction of a wharf on the Mississippi river, Carvin to receive $40 per 100 square feet of floor area, and to follow certain specifications. The company reserved the right to supervise the work and to control the manner of performing it. The plaintiff was injured by falling from the wharf during its construction and claimed that the accident was caused by the negligence of the defendants in leaving the wharf open to passersby in its dangerous condition. Judgment was for plaintiff below, and the defendant sues out a writ of error.]

Mr. Justice HUNT. * * * The rule extracted from the cases is this: the principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of. So long as he stands in the relation of principal or master to the wrongdoer, the owner is responsible for his acts. When he ceases to be such and the actor is himself the principal and master, not a servant or agent, he alone is responsible. Difficult questions arise in the application of this rule. Nice shades of distinction exist, and many of the cases are hard to be reconciled. Here the general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built was not pointed out. That rebuilt was to be as good as new. The new to be of the best workmanship. This is quite indefinite and authorizes not only, but requires a great amount of care and direction on the part of the company. The submission of the whole work to the direction of the company's engineer is evidence, although not conclusive, that the company retain the management and control. The reservation of authority is both comprehensive

and minute. The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All the details are to be completed under their orders and according to their direction. The contractor undertakes in general terms to do the work well. The company reserve the power not only to direct what shall be done but how it shall be done. This is an important test of liability. * * *

[Judgment affirmed.]

BOSWELL et al. v. LAIRD et al.

Supreme Court of California, 1857. 8 Cal. 469, 68 Am. Dec. 345.[8]

FIELD, J., delivered the opinion of the court. * * *

The action is brought to recover damages sustained by the plaintiffs, in consequence of the breaking of a dam or embankment constructed across Deer Creek, in Nevada county, by * * * Moore and Foss, under a contract with the defendants Laird and Chambers. It appears from the evidence introduced on the trial, that in June, 1856, * * * Moore and Foss, entered into a contract with Laird and Chambers [defendants], by which, in consideration of the payment by the latter of certain moneys in the progress of the work, and the balance upon its completion, Moore and Foss bound themselves to construct, at a designated point on the creek, a dam or embankment, of certain specified dimensions, with good and substantial materials, in a workmanlike manner, and capable of resisting all floods and freshets of the stream, for a period of two years, and to deliver it completed by a given time. The construction was commenced in pursuance of the contract, in July or August, 1856, and with the exception of an interval of some weeks in September and October, was progressed in, until February 14, 1857, when, being still incomplete, it was broken by a sudden freshet, and a large volume of water detained by the embankment being thus loosened, rushed down the channel of the stream, carrying away and destroying, in its course, the store of the plaintiffs, with their stock of merchandise.

The defendants Moore and Foss are architects, and were at the time of the contract reputed to be experienced and skillful in their profession; and from the commencement of the work up to and including the time of the breakage, they had exclusive control over its construction. The defendants Laird and Chambers exercised no superintendence, gave no directions, furnished no materials, employed no hands, and although the time within which, by the contract, the work was to be completed had passed, they had never signified any willingness to waive the objection as to the time, and accept the same when completed. * * *

[8] Statement of facts is omitted.

The relation between parties to which responsibility attaches to one, for the acts or negligence of the other, must be that of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable. The responsibility attaches to the superior, upon the principle "qui facit per alium facit per se." To determine the responsibility, therefore, it is necessary to ascertain whether the relation existing between the party charged and the party actually committing the injury, be in fact that of superior and subordinate, or master and servant. "Unless the relation of master and servant exist between them," said Coleridge, J., in Milligan v. Wedge, "the act of one creates no liability in the other." 12 Adol. & Ellis, 737. "The rule of respondeat superior," said the Court of Appeals of New York, in Blake v. Ferris, "as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation, wherever it exists, whether between principal and agent, or master and servant, and to the subjects to which that relation extends, and is coextensive with it, and ceases when the relation itself ceases to exist." 1 Selden, 48.

By applying the test thus laid down to the relation existing between Laird and Chambers on the one hand, and Moore and Foss on the other, the question of liability will be easily solved. The relation between them wants one of the most essential features of the relation between master and servant. Something more than the mere right of selection, on the part of the principal, is essential to that relation. That right must be accompanied with the power of subsequent control, in the execution of the work contracted for. In the present case, that power was wanting, and, of course, the relation to which it was essential did not exist. Laird and Chambers conceived the project of constructing a dam across a mountain stream, and applied to architects by profession, of reputed skill and experience, to carry the project into execution. A dam capable of effecting a certain result was contracted for; the mode of construction, the selection of materials, and the employment of hands, were all entrusted to contractors, who, from their profession, were supposed to be much better qualified to judge of such matters than Laird and Chambers themselves. The relation between the parties was that of independent contractors; Laird and Chambers, on the one hand, contracting for a dam of certain dimensions and strength;—and Moore and Foss, on the other hand, contracting to construct and deliver such dam within a specified time, for a stipulated sum. * * *

For injuries occurring in the progress of the work before its completion and acceptance, the contractors alone were responsible to third parties, the defective construction which caused the injury not being inherent in the original plan contracted for. If the mode and manner which constituted the defect by which the injuries complained of were occasioned, had been inherent in the plan, and this plan had been

devised by Laird and Chambers, which the contractors were simply engaged to carry out, then liability would attach to Laird and Chambers, for injuries occurring in its progress, as well as afterwards. But this is not pretended. If the injuries complained of had been occasioned after the completion of the dam by the contractors, and its acceptance by Laird and Chambers, there can be no doubt of the liability of the latter. Parties for whom work contracted for is undertaken, must see to it before acceptance, that the work, as to strength and durability, and all other particulars necessary to the safety of the property and persons of third parties, is subjected to proper tests, and that it is sufficient. By acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties, the liability of the contractors has ceased, and their own commenced. In the present case, the damages are, in fact, claimed for the negligence and unskillfulness of the work of the contractors before its completion and acceptance, and it is sought to fasten a liability for such damages upon Laird and Chambers. * * *

[In this case, the liability of Laird and Chambers depends solely upon the establishment of the relation of principal and agent between them and Moore and Foss. Since no such relation here existed, for the reason that Moore and Foss were independent contractors, the damage resulting from their negligence can upon no theory be imputed to the defendants. The judgment below for the plaintiffs is reversed.]

CHAPTER 2

LIABILITY OF AGENT TO THIRD PARTY

SECTION 1.—IN CONTRACT

(1) Where Agent's Act is Unauthorized

KROEGER v. PITCAIRN.

Supreme Court of Pennsylvania, 1882. 101 Pa. 311, 47 Am. Rep. 718.

[Pitcairn was a fire insurance agent and had written a policy for Kroeger. Kroeger kept petroleum on his premises, which was forbidden by the terms of the policy, unless written consent was indorsed thereon. Kroeger called Pitcairn's attention to this clause and was assured by the latter that no written indorsement was required, where the amount kept was so small as that which Kroeger carried in stock. Kroeger therefor accepted the policy without the indorsement. A fire destroyed his stock, and in an action against the insurance company Kroeger was defeated because he had kept this petroleum without the written consent. He brought this action against Pitcairn to recover damages for the misrepresentation. Judgment for defendant below.]

Sterrett, J. * * * What was said and done by defendant, in the course of the transaction, amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition, on behalf of the company he assumed to represent, that if the insurance was effected it should be with the understanding that a barrel of carbon oil was included in and formed part of the insured stock of merchandise, without being specially mentioned in the policy. The plaintiff doubtless so regarded his declarations, and relying thereon, as the jury has found, accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance, authorizing him to keep in stock, as he had theretofore done, a small quantity of carbon oil. It was not until after the property was destroyed that he was undeceived. He then discovered, that in consequence of defendant having exceeded his authority, he was without remedy against the company. Has he any remedy against the defendant, by whose unauthorized act he was placed in this false position? We think he has. * * * As a general rule, "whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing. * * *" Story on Agency, 264. * * *

The cases in which agents have been adjudged liable personally have sometimes been classified as follows, viz.: (1) Where the agent makes

a false representation of his authority with intent to deceive; (2) where, with knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and (3) where he undertakes to act bona fide, believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self constituted agent; and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable. * * *

Judgment reversed. * * *

SWEARINGEN et al. v. C. W. BULGER & SON.

Supreme Court of Arkansas, 1915. 117 Ark. 557, 176 S. W. 328.

Action by C. W. Bulger & Son against C. W. Swearingen, Hot Springs Baptist Church, and others. Judgment for defendant church, and judgment for plaintiff against defendants Swearingen and others, and they appeal. Reversed and remanded for new trial.

McCULLOCH, C. J. Hot Springs Baptist Church (Incorporated), of the city of Hot Springs, Ark., decided to build a new church edifice in April, 1908, and through its pastor began negotiations with appellees, a firm of architects in the city of Dallas, Tex., for the preparation of plans and specifications. Appellants and certain other members of the church were appointed as a building committee, with authority to make contracts, but the authority was limited to that of forming plans and building a church not to cost exceeding the sum of $50,000. The pastor of the church was ex officio a member of the committee and was the most active member; most of the negotiations with appellees being conducted through him. A contract was finally entered into with appellees for preparation of the plans and specifications; the compensation to be 3 per cent. on the estimated cost of the building, or $1,500, payable in three equal installments, the first of which was paid. Appellees prepared plans and specifications and delivered them to the committee, and this is an action to recover the sum of $1,000, and interest thereon, balance due on the price agreed to be paid. Appellants, as members of the committee, and the church itself, were sued jointly. The church defended on the ground that it had given no authority to make a contract for the construction of a church in excess of the cost of the sum of $50,000, and appellants defended on the ground that they made no contract to bind themselves individually, but acted only as agents of the church, and were not personally liable. The trial of the case resulted in a verdict in favor of the church but against appellants as members of the building committee, for the amount of the balance due under the contract.

It is not contended that appellants entered into any contract, except in their representative capacity, for the benefit and in the name of the church, but recovery against them was sought alone upon the theory that they exceeded their authority. It is undisputed that the plans and specifications were for a church of an estimated cost far in excess of the sum of $50,000, and that the church itself is not liable on account of the lack of authority to bind it to the contract, which was in fact made with appellees. The court properly submitted, in instructions requested by appellees, the question of the nonliability of the church if its authority had been exceeded. The instructions told the jury that, if "said building committee exceeded its authority and did contract with plaintiff for plans for a building to exceed in cost $50,000," the church would not be liable. The jury found in favor of the church, and we must treat the issue settled that the church is not liable because of the fact that it had not authorized the committee to enter into a contract for the preparation of plans in excess of the cost named above. * * *

[The sole question before us, therefore, is as to the liability of the appellants, the individual members of the building committee who signed the contract with appellees in the name of the church. The principle that an agent who has exceeded the limits of his authority so far that there may no liability attach to his principal will be personally liable to the third party with whom he dealt either for breach of an implied warranty of authority or in an action for deceit, is a familiar one.] We [have in the past] had occasion to lay down the law generally as to the personal liability of an agent who contracts in excess of the authority delegated to him by his principal. There are, however, many limitations upon that general rule, and one of them is that if the party with whom the agent deals has full knowledge of the lack of authority, and there is no express undertaking on the part of the agent to make himself personally liable, he does not become liable merely because of the fact that he exceeds his authority. The law on that subject is stated as follows:

"The above rules in respect to an agent's liability for entering into a contract on behalf of an assumed principal apply, however, only where the third party has acted in good faith and has been induced or misled into entering into the contract by the agent's express or implied representations as to authority. In order that such party may hold the agent liable for damages, it is necessary that he should have been bona fide ignorant of the extent of the agent's authority. If he knows, or has knowledge sufficient to put him on inquiry, of the facts and circumstances surrounding the agency, and he fails to make use of such knowledge or to make such inquiry, it cannot be said that he has been induced or misled into the contract by the agent's express or implied representations, and he cannot hold the agent responsible for any injury he may have suffered thereby, unless the agent has concealed or misrepresented material facts to his injury. Hence where an agent, at the time he enters into the contract, bona fide discloses to the other party all the facts and circumstances in the case, in reference to the authority which he claims to have, such party cannot say that he has been misled, so as

to hold the agent liable for any damage he may have incurred." 2 Clark & Skyles on Agency, § 582.

There are many decisions on that subject, and the law is well settled. [Applying this limitation of the general doctrine, to the case before us, it appears very clear that under the evidence there can be no liability against the appellants as agents, for the reason that it is not disputed that Bulger & Son] appellees had full knowledge of the fact of the limitations upon the authority of the committee. * * * That being true, the committee was not personally liable, not having assumed any expressed personal liability in entering into the contract. * * *

[Judgment reversed.]

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(2) Where Agent Failed to Disclose Principal

(a) On Simple Contracts

An agent who assumes to act as a principal, and who does not disclose the fact of his agency and the identity of his principal, may be held on the contract by the third party with whom he dealt. So much for the rights of the third party against the agent. We have already examined into the rights of the third party against the undisclosed principal; he may hold the undisclosed principal upon discovery, subject to the exceptions noted. In simple contracts (though not on contracts under seal and negotiable instruments), parol evidence is admissible to prove that the contract executed by and in the name of the agent is the contract of the principal; and the principal may sue and be sued on the contract. The important thing to note here, however, is that the *agent* is not discharged. The third party to whom he represented himself as principal may hold him as such, and justly so, since the third party extended the credit to the agent alone. Of course, the fact that the third party has his election to proceed against the principal rather than the agent may free the agent from liability in case the third party takes this choice, but the only way in which the agent can make certain his freedom from personal liability is to disclose his agency and the name of his principal upon the contract which he signs. The proper form is to write the name of the principal by himself as agent.

(b) On Contracts under Seal and on Negotiable Instruments

Where an agent enters into a contract under seal, or signs a negotiable instrument, without disclosing the name of his principal and the fact of his agency thereon, the agent is absolutely and solely liable. No parol evidence is here admissible to show that the contract was in reality that of an undisclosed principal. The third party contractee cannot hold

the principal, nor can the principal sue on the contract. Suppose that an engineer, charged by his employer to build a bridge, enters into a contract under seal for the purchase of land for the bridge site, signing the contract in his own name. The engineer would himself be personally liable on the contract, and, if sued thereon, would be prevented from introducing any evidence that he had acted directly in compliance with his employer's orders and that the employer was the real buyer. It is similar with a negotiable instrument, such as a promissory note or bill of exchange; the agent who has signed such in his own name, without disclosing his principal thereon, will be personally liable for the payment of the instrument, even though he himself did not received the borrowed money.

WILLIAMS v. ROBBINS et al.

Supreme Judicial Court of Massachusetts, 1860. 16 Gray, 77, 77 Am. Dec. 396.

[Action against Robbins and Winship, copartners, on a note reading:] "Four months after date I promise to pay to the order of Bartlett & Williams $300 payable at Agawam Bank, Springfield, value received. A. Copeland, Ag't." [At the trial it was proved to have been given by Copeland as agent of the defendants. From judgment for the defendants, plaintiff appeals.]

HOAR, J. The most important question which this case presents is whether the note declared on can be considered the contract of the defendants, if it were conceded that Copeland had full authority to make it in their behalf, and that the consideration was exclusively received for their benefit. The rule is thus stated by Mr. Justice Story: "Where upon the face of the instrument the agent signs his own name only, without referring to any principal, there he will be held personally bound, although he is known to be or avowedly acts as agent." Story on Notes, § 68. But "if it can upon the whole instrument be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." Section 69.

No agency is disclosed upon the face of this note except by the addition of the * * * word "agent" to the signature of the promisor. There is nothing upon the instrument itself to indicate whose agent he was in the transaction, nor what principal, if any, he intended to make responsible.

It was said by this court in the recent case of Fuller v. Hooper, 3 Gray, 341, that "the rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue, on a negotiable instrument can be shown by parol evidence." "In other simple contracts the rule is different." * * *

Exceptions overruled.

SECTION 2.—LIABILITY OF AGENT TO THIRD PARTY—IN TORT

The law is well settled that a third person may always hold an agent individually liable for a tort committed by the agent, whether or not the agent was at the time acting within the scope of his employment. For example, where a grocer's delivery boy, driving in a negligent manner, causes an injury to a pedestrian, the injured person may sue either the delivery boy or the grocer, or both, since in tort the liability of principal and agent is both joint and several.

CHAPTER 3

LIABILITY OF AGENT TO PRINCIPAL

SECTION 1.—DUTY TO OBEY INSTRUCTIONS

It is the duty of the agent carefully to follow the instructions given him by the principal. If he exceeds these instructions and enters into unauthorized contracts, for which the principal may be made liable, the agent will be liable to the principal for all damages suffered by the principal arising therefrom.

SPALDING v. HEIDEMAN et al.

Appellate Court of Illinois, 1901. 96 Ill. App. 405.

It appeared from the evidence that one Louis Heideman, being a parish priest of the Catholic church in Loda, Illinois, wishing to erect in the city of Paxton a Catholic church, he requested the privilege of so doing from Bishop Spalding, the bishop of the diocese in which Paxton is located. Spalding, as such bishop, owning several lots in said city of Paxton, authorized Heideman to build a church thereon, not to exceed in cost the sum of $2,000. Father Heideman proceeded to build a church on the lots costing something over $7,000, which excess of cost was unknown to Bishop Spalding until after the church was built. * * *

WATERMAN, J. * * * It is a fundamental duty of an agent to obey all reasonable and lawful instructions given to him by his principal; and this although the agent may think he knows of a very much better way. If the agent disobeys instructions given to him, and, because of such disobedience, loss or injury comes to the principal, the latter may recover from the agent such substantial damages as he has sustained by reason of such disobedience. Mechem on Agency, §§ 473, 474.

Father Heideman having exceeded the authority given to him by Bishop Spalding, and thereby charged the bishop's property with liens amounting to several thousand dollars and quite likely involved the bishop in a large personal liability, was responsible to the bishop for all costs and expense he was put to by reason of such disobedience. * * *

SECTION 2.—LOYALTY—AGENT IS IN A POSITION OF TRUST AND CONFIDENCE

(1) Agent Cannot Make Personal Profit

All personal profits made by an agent from what properly is, or is connected with, his employer's business, will be held in trust by the agent for his principal. So an architect or a superintendent of construction cannot be a secret partner of the contractor. An agent stands in a position of trust and confidence toward his principal, which forbids his making a private profit from the information which he acquires concerning his employer's affairs.

ESSEX TRUST CO. v. ENWRIGHT et al.

Supreme Judicial Court of Massachusetts, 1913. 214 Mass. 507, 102 N. E. 441, 47 L. R. A. (N. S.) 567.[1]

Loring, J. The question on which the decision in this case depends is this: In case a reporter on a newspaper in the course or by reason of his employment learns that the premises on which the business of publishing the paper is conducted are of peculiar value to his employer or one carrying on his business, has he the right without his employer's knowledge to take a lease of the premises and hold them as his own to the injury of his employer's property? * * *

The material facts were in substance as follows: The defendant was a reporter on a daily newspaper published in Lynn, which was mortgaged to the plaintiff trust company to secure an issue of bonds the amount of which is not stated. The business of making up and printing the newspaper was carried on in two stories and in the basement of a building in Lynn, of which the Lynn Publishing Company (the mortgagor) was a tenant at will. The printing press of the Publishing Company was "situated in the basement upon a foundation of concrete, imbedded in the earth underneath the building, and could not be removed from said basement and set up in some other place in less than two weeks' time, and at a very considerable expense. While the press was being taken down and being set up in another place the paper could not be published unless it made arrangements for its printing from some other press, and it appeared in evidence that no press was in Lynn that could be used for that purpose in connection with the electrotyping plant of the company except after expensive alterations in the electrotyping plant." "Outside of its machinery, type, fixtures and furniture, it depended for the value of its property on the good will of the business, and upon the ability to get out its paper daily."

[1] Statement of facts is omitted.

[The defendant was a reporter in the employ of the paper. He secretly secured a lease of the premises occupied by his employer, and immediately served a notice to vacate the building. This is a bill in which the plaintiff trust company, owner of the newspaper and employer of defendant, seeks to have the defendant enjoined from interfering with the possession held by it of the premises in Lynn, and from instituting any proceedings for their eviction, and further seeks that defendant may be decreed to hold said lease as "constructive trustee" for the plaintiff company.]

The findings already stated establish the peculiar value which these premises had to the defendant's employer or to any one carrying on the employer's business of publishing this newspaper. And it is evident from the * * * facts found, that the defendant learned in the course or by reason of his employment of the peculiar value which these premises had for his employer. * * *

The doctrine invoked by the plaintiff in this suit had its origin in two decisions by Lord Eldon. In Yovatt v. Winward, 1 Jac. & W. 394, the defendant (formerly employed as a clerk by the plaintiff, who was a veterinary surgeon) was enjoined from using medicines compounded from the plaintiff's recipes which he (the defendant) had surreptitiously copied while in the plaintiff's employ. In Abernethy v. Hutchinson, 3 L. J. (O. S.) Ch. 209, the publication in the Lancet of lectures on surgery delivered by the plaintiff at St. Bartholomew's Hospital, which the defendants had obtained from the students attending the lectures, was enjoined. * * *

There are two cases, one in California and the other in Illinois, which have gone as far in the application of this doctrine as we are asked to go in the case at bar. In Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242, the defendant, a clerk employed by the plaintiffs, who were warehousemen, secured a lease of the warehouse in which the business was conducted, behind his employers' backs by telling the owner of it that the "plaintiffs would probably give up the warehouse," and offering an advance of $50 a month in the rent. The defendant then began soliciting custom for himself as the successor of his employers. On this becoming known he was discharged by his employers and was ordered by the court to assign the lease to the plaintiffs. In Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541, Davis, who was the defendant in the court below, was hired by Hamlin, the lessee of one of four important theaters in Chicago, as his business manager. A year and three months before Hamlin's lease expired Davis behind Hamlin's back secured a lease for himself by giving $4,500 more rent a year. It appeared in evidence that Hamlin had built up a good will in connection with his theater by ten years' occupancy. Davis was directed to hold the lease which he had secured as trustee for Hamlin. The defendant has argued that he was not within this rule because the duty of securing a lease was not intrusted by his employer to him. The same contention was the main argument put forward in Davis v. Hamlin and was true of the clerk in Gower v. Andrew. The complaint against the defendant is that he has made use of information

which has come to him in his employment to the detriment of his employer. In our opinion that is enough to entitle the employer to equitable relief. * * *

The plaintiff is entitled to a decree directing the defendant to assign to the plaintiff the lease obtained by him on being paid the rent, if any, paid by him under it, and to its costs. * * *

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(2) Agent Cannot Contract for Principal with Himself

PAIGE v. AKINS.

Supreme Court of California, 1896. 112 Cal. 401, 44 P. 666.

Haynes, C. * * * During all the time covered by the evidence, the plaintiff resided in the city of San Francisco, and owned large quantities of land in the counties of Stanislaus and Merced. About ten years before the commencement of this action the defendant became a tenant, or cropper, upon a portion of plaintiff's land in Merced county known as the "Gardner Ranch," and farmed it two years upon shares. At the expiration of that time the defendant was employed as agent and foreman in charge of all plaintiff's lands in said counties, with authority to rent the same, collect the rents, and negotiate the purchase and sale of land. Afterwards, at defendant's suggestion, an arrangement was made between the parties by which the plaintiff purchased cattle, and furnished pasture for them, the defendant to take charge of them and pay "the running expenses," and, after deducting 1 per cent. per month interest on the purchase price of the cattle, was to receive one-half of the profits as compensation for his services and expenses. This relation between the parties as to the cattle, and the relation of principal and agent in reference to renting the land and defendant's control as foreman, continued until March 25, 1892, when the plaintiff discharged him. Whether the other relation, that of landlord and tenant, existed at that time, is the principal question in the case, the subject of the action being the ownership of a crop upon 500 acres of plaintiff's land which the defendant claims he put in as tenant, he to pay a share of the crop for the use of the land. Acting upon this claim the defendant began to cut and remove said crop, and plaintiff, claiming that the crop was not planted by the defendant upon shares, but that he did it as plaintiff's foreman, for plaintiff's benefit, and at plaintiff's expense brought this action to enjoin him from cutting and removing said crop. * * *

There is no controversy or conflict as to the fact that the defendant was the agent of plaintiff in renting his lands and collecting the rents. For these services, and for his services as foreman, he received a compensation of $50 per month. The record does not specify with any particularity the duties attached to the position of foreman, but we may assume that the word is used in its ordinary sense, denoting the chief or superintendent of employés, as one who has the general over-

sight and care of the property. All of these duties involve the relation of principal and agent, and it was not in the power of the defendant to contract, as the agent of the plaintiff, with himself as the other party to the contract. A tenancy, such as is claimed by the defendant to have existed as to this land and crop, could only be created by contract; and, if the contract were valid, it gave the tenant the exclusive right to the control and possession of the crop until it was harvested and divided, and vested in him the absolute ownership of the share to which he was entitled. That an agent cannot confer upon himself such rights and privileges in the lands and property of his principal is too well settled to require extended discussion or citation of authorities. It is only necessary to say that the absence of an intention on the part of the agent to injure his principal, or that the self-imposed terms of the tenancy were those usually made in renting to third persons, do not affect the question, and will not defeat the plaintiff's right to the remedy he has invoked. Pom. Eq. Jur. § 959, quoted and approved in Sterling v. Smith, 97 Cal. 343, 32 P. 320.

[There being no evidence whatever that plaintiff personally leased the land to the defendant, the latter's claim to the rent must depend upon his own contract made as plaintiff's agent with himself, which as we have seen has no validity. The prayer of the plaintiff that defendant be enjoined from harvesting and removing the crop from plaintiff's land should be granted.]

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

PORT et al. v. RUSSELL et al.

Supreme Court of Indiana, 1871. 36 Ind. 60, 10 Am. Rep. 5.

BUSKIRK, J. [This was a bill for injunction filed by the stockholders of a road company, praying that the treasurer of the corporation be restrained from paying out any money on a contract for the construction of a gravel road. The essence of the complaint is that the directors, the agents of the plaintiff corporation, were in fraudulent collusion with the road contractors to whom they had let the contracts for road construction. There is some evidence to the effect that an agreement existed whereby one of the contractors had agreed to share his profit on the contract with the directors. Further, it appeared from the evidence as an uncontroverted fact that one of the road contractors to whom a portion of the contract had been let was also a director of the company.]

The question presented for our consideration and decision is: Can a director in an incorporated company become a contractor with the company, or can he have any personal and pecuniary interest in a contract between the company of which he is a director and a third person? We think the law is well settled, both in England and in this country, that he cannot. In the case of Aberdeen Railway Company

v. Blakie, 1 Macq. Ap. Cas. 461, the House of Lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer for the supply of iron furnishings to a railway company of which he was a director, or the chairman at the date of the contract, was invalid, and not enforceable against the company.

Lord Cranworth, in delivering the opinion of the court, says: "A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, any personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. * * *

[Under the sole circumstance of identity of interest existing between the parties to this contract, we are of the opinion that it should not be enforced, and that an injunction should issue in accordance with the prayer contained in the bill.]

SECTION 3.—AGENT'S DUTY OF CARE AND SKILL

The agent owes to his principal the exercise of that degree of care and skill which a reasonably prudent person would be expected to exercise in similar circumstances. The professional man, the doctor, lawyer, architect, builder, owes to the person who employs him this duty of care and skill. It is to be observed that, apart from a special contract to that effect, there is no insurance nor warranty that a certain result will be produced; all that the law requires from the holding out is the exercise of that degree of skill, knowledge, and care usually displayed by similar members of the profession in similar circumstances.

CHAPEL v. CLARK.

Supreme Court of Michigan, 1898. 117 Mich. 638, 76 N. W. 62, 72 Am. St. Rep. 587.

Plaintiff, an architect, executed plans and specifications for the defendant for a large building erected in the city of Grand Rapids. The arrangement rested in parol. * * * Before the building was completed a difficulty arose between them, and plaintiff was discharged. He thereupon instituted this suit to recover the value of his services in drawing the plans and specifications. The defendant, with the plea of the general issue, gave notice that plaintiff had not performed his

work with due and necessary skill and care; that his plans and specifications were faulty, defective, and unskillful; and specified the details wherein they were faulty. Plaintiff recovered verdict and judgment.

GRANT, C. J. (after stating the facts). 1. Defendant requested the court to instruct the jury that if they found the contract as claimed by plaintiff, and they should further find that by mistake of the plaintiff the defendant had been caused unnecessary expense in the construction of the building, they should determine the amount of such unnecessary expense, and deduct it from the value of the services rendered. This was refused, and the court instructed the jury as follows: "The notice of defendant, which I have called your attention to, alleges that the plans and specifications drawn by the plaintiff were unskillfully drawn, whereby the alleged damages resulted. A person who holds himself out to the public in a professional capacity holds himself to be possessed of average ability in such profession, and the law implies that he contracts with his employer (1) that he possesses that requisite degree of learning, skill, and experience which is ordinarily possessed by the profession in the same art or science, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business; (2) that he will use reasonable and ordinary care and diligence in the exercise of his skill—in the application of his knowledge—to accomplish the purpose for which he is employed; (3) in stipulating to exert his skill and apply his diligence and care, an architect, like other professional men, contracts to use his best judgment. * * * A mistake in judgment does not excuse negligence or ignorance."

The request does not correctly state the law. It makes the architect a warrantor of his plans and specifications, although they might be justified by the knowledge and experience of those ordinarily skilled in the business. The law does not imply such a warranty or the guaranty of the perfection of his plans. The result may show a mistake or defect in them, although he may have exercised the reasonable skill required. Plans, now considered safe, experience and advanced knowledge of the science may hereafter show to be unsafe. The law requires only the exercise of ordinary skill and care, in the light of present knowledge. Coombs v. Beede, 89 Me. 187, 36 A. 104; Shipman v. State, 43 Wis. 381; Smothers v. Hanks, 34 Iowa, 290; 2 Am. & Eng. Enc. Law (2d Ed.) 818. The above authorities seem to hold that the responsibility of an architect does not differ from that of a lawyer or physician. When either possesses the requisite skill and knowledge, and in the exercise thereof has used his best judgment, he has done all that the law requires. The question was, had plaintiff exercised that degree of care and skill and that judgment which are common to the profession or business? The defects alleged to exist in the plans were in the construction of the sewer, the cornice, and coping for the towers, the stairway and elevator, and the flue of the chimney. If the plans and specifications for these parts of the building were justified by the com-

mon knowledge upon such matters at the time, and met the judgment and approval of those then ordinarily skilled and experienced in their construction, the plaintiff had complied with his contract. We think that the jury must so have understood the instructions. * * *

COREY v. EASTMAN.

Supreme Judicial Court of Massachusetts, 1896. 166 Mass. 279, 44 N. E. 217, 55 Am. St. Rep. 401.

Plaintiff, James R. Corey, employed Joseph S. Eastman, an architect, to draw plans and specifications for a house. He also asked the defendant to draw the contract with the builder. Defendant drew the contract, and delivered it to plaintiff, who executed it with the builder. The contract provided for six payments, to be made at various stages in the work. On the 1st of July, 1891, the builder demanded the first payment called for by the contract. He presented a certificate from the architect stating that the amount of work called for by the contract had been completed, and that the first payment was therefore due. Plaintiff examined the work, and found that it did not comply with the requirements of the contract, and so informed the architect. The architect represented, however, that the work which had been performed was worth more than the amount called for in the contract. Acting upon the representation, plaintiff paid the builder the first installment due. The builder then abandoned the contract, and went into insolvency.

HOLMES, J. This is an action against an architect for alleged misstatements of the amount of work done under a building contract, by the terms of which, as usual, partial payments were to be made from time to time upon the architect's certificate. The jury found a verdict for the defendant on the first count, so that only the second count needs to be considered. On that they found for the plaintiff. The case is here on a report of the defendant's appeal and exceptions. * * *

The claim for damages was put to the jury as standing on an alleged negligent or willfully false statement by the defendant, in conversation with the plaintiff, distinct from the defendant's act of certifying the sum paid to be due. No question of variance is before us, but the question raised is whether the defendant was liable, as a matter of substantive law, if he made such a negligent statement to the plaintiff as to the value of the work done, and the plaintiff paid on the strength of it. Probably, under the English law, the defendant would not be liable for negligence in making his certificate upon a matter which the plaintiff and the builder had agreed by their contract to leave to him. Stevenson v. Watson, 4 C. P. Div. 148. * * * But a different principle may come in with regard to oral advice or statements to his employer. In making them, the architect is, or may be found to be, rendering a purely partisan service under his contract; and, if he is, then he is bound to show reasonable care, and reasonable professional judg-

ment. As a consequence of his contract of employment, the law throws the risk of his statements upon him at an earlier point than it would do otherwise. But for the contract, he would not be liable for statements, unless fraudulent, or for advice, unless dishonest. Under the contract, negligently erroneous statements and imprudent advice become torts, on the same principle that, under a warranty, an erroneous statement was a deceit, by the old common law, without even negligence. * * *

Judgment on the verdict.

LOTHOLZ v. FIEDLER.

Appellate Court of Illinois, 1895. 59 Ill. App. 379.

Mr. Presiding Justice WATERMAN delivered the opinion of the court.

This is a suit by the appellee, an architect, against the appellant, to recover for work in the preparation of plans, etc., and superintending building. As stated by counsel for appellee in his opening address to the jury:

"The plaintiff is an architect and he was employed by the defendant to draw the plans and specifications, let the contracts for, and superintend to completion, the erection of a fine mansion for the defendant and his family to live in. It was especially agreed in this case, that the plaintiff was to draw the plans and specifications, and superintend the construction of the building from beginning to end, for a commission of five per cent. on the cost of the building when complete. He was also employed to draw plans for a barn and other houses. The plaintiff claims that he did draw the plans and specifications, let the contracts, and superintended the work until completed, of a house that cost a little over $34,000, and is entitled to five per cent. on that sum, and the defendant has refused to pay him, and he has brought this suit to recover his commission, and for the services in drawing the sketches and other plans."

The duties of appellee among others were as stated in the building contracts.

"Section 5. The proprietor has engaged August Fiedler to be superintendent and agent in the premises. The duties of this office being to enforce all the conditions of the contract, and to furnish all the necessary drawings and information that are required to properly illustrate and explain the design given."

Did appellee discharge his duties, so that he is entitled to the commission he asks, something over $1,700? is the question of fact presented by this case.

Appellee was employed to draw plans and specifications for, and superintend the construction of, a first-class expensive house, and was to be paid a large sum for doing this work. The house he thus undertook to see that appellant obtained was defective in several important matters. One of the chimneys seems to have been very imperfectly

constructed; it was not plastered, as the specifications demanded; there were cracks in it out of which the smoke poured into the hall when a fire was lighted in the furnace below; the windows in some of the rooms admitted the rain because mortar had not been put at the sides; the mouldings had to be taken off and the space packed with oakum. Nails were driven through the plumbing pipes and they leaked. As to this appellee says he "defies any one superintending that building to detect the fact that the carpenter had driven those nails through the pipe."

Appellee was not so much employed to detect the fact that the carpenters had driven nails through the plumbing pipes as he was to prevent this being done. He was to superintend, to enforce all the conditions of the contract, and most certainly he should have seen to it that nails were not driven through plumbing pipes.

Such gross carelessness and imperfect construction it was his duty to have prevented.

The window weights were, by written contract, to have been of lead; those put in were mostly iron. Appellee attempts to excuse this by showing that Mr. Lotholz was about the house at times during its construction, and that iron window weights were lying around, which he must have seen. If Mr. Lotholz did see this, it did not change the written contract or relieve appellee from his duty to see that it was carried out.

It is unnecessary to go over all the defects, imperfect construction of this house, which the evidence shows existed, and for which no sufficient excuse is given.

Appellee is not, under the evidence presented by this record, entitled to be paid as if he had superintended, so as to give appellant a house in accordance with the contracts he, appellee, undertook to see fulfilled.

Appellant, in an affidavit by him filed, admitted an indebtedness of $300.

Appellee having recovered a verdict for the full compensation he was to have if he performed his undertaking, the judgment of the circuit court is reversed and the cause remanded, unless appellee will remit from his judgment so as to leave it $300. * * *

CHAPTER 4

LIABILITY OF PRINCIPAL TO AGENT

SECTION 1.—IN CONTRACT

1. Principal's Liability for Discharge of Agent

(1) In Agency Without Fixed Term

SIBBALD v. BETHLEHEM IRON CO.

Court of Appeals of New York, 1881. 83 N. Y. 378, 38 Am. Rep. 441.

[Action for commission in selling steel rails. It appeared that the plaintiff had been employed by the defendant as broker to sell steel rails, particularly to the Grand Trunk Railway, with whom the plaintiff was supposed to have influence. In December, plaintiff interviewed officers of the railroad, but could get no results. During the succeeding four months plaintiff could do nothing to get the railroad interested. On April 7 the plaintiff received a request for a price, and, receiving a price from the defendant, he quoted this price and also a price from other parties for whom the plaintiff was broker. The railroad accepted the other offer. Later in the month plaintiff sent the railroad a sample of the defendant's iron and on the 23d of April received from it a request for a price from the defendant for 1,000 tons. At an interview which followed between the plaintiff and the president of the defendant, the latter refused to make a price or to deal further through the plaintiff. The sale was finally made to the Grand Trunk on May 13, through another broker.

[At the trial the judge, after charging the jury that the plaintiff could not recover if he had been unsuccessful, added: "That the defendant had no right to refuse to avail himself of those things which the broker had done and then, indirectly—no matter whether in good or in bad faith—by other channels, avail itself of the effort of the broker with whom it has declined to continue the negotiations."

[The defendant excepted to this charge and to a refusal to give other charges, and, upon judgment for the plaintiff, appealed.]

Finch, J. * * * It may aid * * * to clearness of statement and accuracy of conclusion, and perhaps remove some elements of debate, if we consider the legal attitude of a broker employed to buy or sell property, and his relative rights and duties as the basis of his claim for compensation.

The duty he undertakes, the obligation he assumes as a condition of his right to demand commissions, is to bring the buyer and seller to an agreement. In that all the authorities substantially concur, although

expressing the idea with many differences of phrase and illustration. * * * In Wylie v. Marine National Bank, 61 N. Y. 416, it was held that to entitle the broker to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms. This implies and involves the agreement of buyer and seller, the meeting of their minds, produced by the agency of the broker. * * *

One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But, that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts * * * moved fairly by a view of his own interest; he has the absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor. * * *

Because the broker originally brought the Bethlehem rails to the notice of the Grand Trunk purchasing officers, and thereafter accomplished nothing more than to lessen the principal's price and sell the rails of its rivals to the proposed customer, he is held entitled to recover commissions on a sale made without his intervention and after his agency had been fairly and lawfully terminated. Grant that what he did may justly be said to have aided in the making of the after-sale, yet that does not furnish ground for recovery, as we have already seen. If it did, such an agency might pass utterly beyond the principal's control. The trial judge, in the earlier part of this charge, had stated the general rule correctly, and as we hold it should be. He said to the jury, "If you find from the evidence in any given case, that the broker has failed to carry out any particular transaction, and that his efforts, although he may have introduced the parties, have terminated, and that he has not succeeded in making the trade, then the principal has a perfect right to resort to other sources for the purpose of effectuating that trade." If the charge had stopped here no error would have been committed. * * * He should have submitted the ques-

tion of good faith in terminating the agency to the jury, and told them if they found that fact, that no commissions could accrue on the after-sale, however much in making it the seller availed himself of the previous labors of the broker.

If, after the broker has been allowed a reasonable time, within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts. If the charge was intended to mean this, and no more than this, the language chosen was unfortunate, for its direct tendency was to convey to the jury an entirely different idea and one with which we do not concur. * * *

Judgment reversed.

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(2) In Agency for a Fixed Term

G. A. KELLY PLOW CO. v. LONDON.

Court of Civil Appeals of Texas, 1910. 59 Tex. Civ. App. 208, 125 S. W. 974.

HODGES, J. * * * The material facts which do not appear as being disputed show that the appellant is a private corporation engaged in the business of manufacturing and selling plows and other farming implements, with its place of business and principal office at Longview, Tex. Some time prior to February, 1907, G. A. Kelly, the president of the company, who had been actively engaged in the management of its affairs, desired to retire, and turned over the business almost entirely to R. M. Kelly, his son, who was at the time secretary and treasurer. R. M. Kelly contemplated enlarging the capacity of the plant and also of extending the business of the company by employing additional traveling salesmen, and desired to employ a suitable man to take the position of sales manager of the company's business. * * * R. M. Kelly had known the appellee for about 10 years prior to the time when they began their negotiations which resulted in the contract referred to in the pleadings. These were commenced by a letter from Kelly to London, asking him to call at the office of appellant on his first visit to Longview. London was at that time employed by the Parlin & Orendorff Implement Company as one of its traveling salesmen, with headquarters at Dallas. On February 18, 1907, London called upon Kelly as requested, when the latter explained the intentions of his company as to enlarging its business, and expressed a desire to employ London to take charge of the sales department. After several meetings, in a conversation concerning the details, of which there is some conflict in the testimony, a written contract was entered into, by which London was employed by the appellant as sales manager for five years at a salary of $333.33 per month, payable monthly. * * *

After the execution of this contract, London entered upon the duties of his position and continued therein till August 6, 1907, at which time he claimed that he was injured in a wreck on a Texas & Pacific Railway train while going from Dallas to Longview. From that time until October 4th he did not perform any services for the appellant. On the latter date he made a settlement with the railway company in which he was paid $4,100 compensation for injuries which he claimed had been received in the wreck referred to. He then returned to work for the appellant, and continued in its service till he was discharged April 4. * * * The effect of the testimony of Kelly was that at the first meeting between him and London before making the contract the latter represented to him that he was then getting $250 per month from the Parlin & Orendorff Implement Company, but would accept the position offered for $300 per month. Witness further stated that he afterwards met London in Dallas, and was there told by him that Mr. Robinson, the local manager for the Parlin & Orendorff Implement Company, "was all broken up and torn to pieces" about his (London's) leaving; that London told him that Robinson had told him (London) that he would meet any price that the Kelly Plow Company could afford to pay him; that, if it offered him $3,600, he would meet that; if it offered him $4,000 he would meet that, and, if that was not satisfactory, he (London) could go to the bookkeeper and tell him what would be satisfactory, and that it would be all right with him (Robinson). Kelly says this led him to believe that London was an exceedingly valuable man in that line of business, and that Robinson had implicit confidence in him, that he had formed a very high opinion of London, and believed everything the latter told him. * * * Robinson, the manager of the Parlin & Orendorff Implement Company, testified that London was in the employ of the Parlin & Orendorff Implement Company at a salary of $200 per month; that his contract was to work by the year at a salary of $2,400 per year to be paid monthly at $200 per month, and that he was not to receive any additional compensation; that some time about March or April, 1907, London told him that the Kelly Plow Company had offered him a salary of $3,600 per annum, and he told the appellee that it was a larger amount than he could afford to pay, and that, if he could make the arrangement he (Robinson) was not disposed to stand in his way, and advised him to accept the position. He offered appellee $50 per month additional, which would make $250 per month, if he would sell $200,000 worth of goods per annum.

As to the fraud which it is alleged the appellee perpetrated upon the railway company in procuring a settlement by which he was paid $4,100 as compensation for injuries claimed, appellant offered testimony tending to show that the shock to the coach in which the appellee was at the time riding was so slight that no injury could have resulted; that an observation of the physical condition of the appellee after the wreck failed to disclose any evidences of the injuries he claimed. There was also testimony of doctors who had made an examination of London to the effect that, if he was injured at all, it was only in a slight degree. Considered in its entirety, the evidence offered by appellant upon

this phase of the defense tended to show that London's injuries were simulated, and that he had by dishonorable means, false statements, and misrepresentations perpetrated a fraud upon the railway company for the purpose of obtaining money. As opposed to this, there was testimony on the part of the appellee tending to show that his injuries were real, and that he had made no false representations to the company and had not been guilty of any of the misconduct charged.

Upon a trial before a jury a verdict was rendered in favor of the appellee for the sum of $3,000. * * *

If the different acts of deception, misrepresentation, and fraud charged in the answer of the appellant be true, then we cannot say that a jury would not be justified in concluding that they were inconsistent with the relations London sustained by his contract. Every one who seeks and obtains employment in positions of trust and confidence impliedly warrants that he is an honest man, and the employer has the right to expect the possession of that personal integrity that will not lead to disappointment if he relies implicitly upon the honor and fidelity of his employé. When the principal discovers that his agent or the master his servant is lacking in those moral qualities that he had a right to expect and rely upon in making the particular contract—in other words, ascertains that his employé is not an honest man and cannot be trusted—why should he not have the right to discharge? If he may discharge for incompetency, either physical or mental, why should he not have the same right when moral unfitness is shown, where moral qualifications form an important consideration in making the contract? We see no good reason why an employer should not be permitted to rid himself of a dishonest and corrupt employé upon a discovery of that fact, without waiting till he has himself been victimized by such corruption and dishonesty. He would have the right to assume that a man who would deliberately make a false statement about one matter would be equally perfidious about another; that a man who would willfully and knowingly perpetrate a fraud upon one party for the sole purpose of obtaining money would, when to his interest to do so, defraud his employer also. * * * Would it be seriously contended that the right of discharge could be exercised by the principal only when it became apparent that his own business was injuriously affected by having such an employé in his service? Would not common justice accord him the right to terminate the contract solely upon the ground that he might justly apprehend that he would in all probability be made the object of his agent's cupidity and fraud? Could the agent complain when he had not disclosed his past record, because the principal then sought to relieve himself from a relation which he would not have made had he known the true facts? No man is compelled to be dishonest or to be guilty of fraudulent conduct. Neither should any other be compelled to continue such a person in a position of trust simply because he took him for a man of integrity and gave him employment. * * *

The judgment of the district court is reversed, and the cause remanded.

FRIED v. SINGER.

Supreme Judicial Court of Massachusetts, 1922. 242 Mass. 527, 136 N. E. 609.

Plaintiff was an actor, and was employed to render services as such. The contract provided that the services should be rendered to the satisfaction of the Columbia Amusement Company, in whose theaters defendant's show played. The agreement between defendant and the amusement company required defendant to make any changes in the personnel of the show required by the amusement company on written notice. Defendant moved for a directed verdict on the grounds that plaintiff was not entitled to recover, that as a condition precedent to recovery he must show that he performed the services to the satisfaction of the amusement company, and that plaintiff had offered no testimony which would warrant a verdict in his favor. At defendant's request the court charged that it was incumbent upon plaintiff to establish that the services were to the full and complete satisfaction of the amusement company, and that if the amusement company, acting in good faith, was not completely satisfied with the services rendered by plaintiff, plaintiff could not recover.

CROSBY, J. The plaintiff and defendant executed an agreement in writing under which the defendant (who was engaged in the theatrical business) was to employ the plaintiff (an actor) for the season of 1919–1920, which could have been found consisted of not less than 40 successive weeks.

Paragraph "Second (a)" of the agreement is as follows:

"The artist agrees to render his exclusive services to the producer for all performances in each week in which he shall be required to appear and that may be lawfully given, and the artist stipulates that such services shall be rendered to the full and complete satisfaction of the Columbia Amusement Company in its exclusive judgment in accordance with the terms and conditions of the franchise agreement granted by said Columbia Amusement Company hereinbefore mentioned, with which conditions the artist hereby agrees that he is familiar, and which it is agreed are to be regarded as a part hereof." * * *

The plaintiff began his employment under the contract, August 18, 1919, and continued to render services until September 13 following, when he says he was wrongfully discharged by the defendant. * * *

As the plaintiff's services were to be rendered to "the full and complete satisfaction of the Columbia Amusement Company" the defendant's liability is conditional. To recover the plaintiff must prove that the services rendered by him were satisfactory to the amusement company. We cannot agree with his contention that the burden rested upon the defendant to show that the company was not satisfied in order to avoid liability. Whelton v. Thompson, 121 Mass. 346; Newton Rubber Works v. Graham, 171 Mass. 352, 50 N. E. 547; Farmer v. Golde Clothes Shop, Inc., 225 Mass. 260, 114 N. E. 303.

A contract like the one here in question where the employee is to render personal services and where consideration of the fancy, taste,

sensibility and judgment of another are involved, must be performed in accordance with its terms; and if the amusement company or its representative, acting in good faith, was not satisfied with the services of the plaintiff, he cannot recover, and the judge so instructed the jury. McCarren v. McNulty, 7 Gray (Mass.) 139; White v. Randall, 153 Mass. 394, 26 N. E. 1071; Whittemore v. New York, New Haven & Hartford Railroad, 191 Mass. 392, 77 N. E. 717.

Even if the work performed would be satisfactory to a reasonable man, if the amusement company, acting in good faith, was dissatisfied with it, the plaintiff cannot recover. Williams Mfg. Co. v. Standard Brass Co., 173 Mass. 356, 53 N. E. 862; Farmer v. Golde Clothes Shop, Inc., supra. * * *

In the opinion of a majority of the court, as the plaintiff failed to prove that he performed the services contracted for to the satisfaction of the amusement company, the motion of the defendant that a verdict be directed in his favor should have been allowed.

Exceptions sustained.

MAY v. NEW YORK MOTION PICTURE CORPORATION.

District Court of Appeal, Second District, Division 2, California, 1920. 45 Cal. App. 396, 187 P. 785.

FINLAYSON, P. J. This is an action by a motion picture actress, employed by defendant, to recover for an alleged wrongful discharge, alleged to have occurred about 21 weeks before the expiration of the term of her employment. From a judgment for plaintiff for $2,123.60, based on the verdict of a jury, defendant appeals. * * *

Plaintiff commenced work for defendant on June 16, 1915, at defendant's camp or studio at Inceville, in Los Angeles county, about 3½ miles from the city of Santa Monica, and continued in its employ until discharged on January 27, 1916. During all this time plaintiff made her home at Santa Monica. The last day she worked for defendant was December 24, 1915. On that day defendant finished a picture in which plaintiff had been cast, and in which she had worked for some weeks. Except when specifically notified and sent for, plaintiff never went to the camp or studio, except weekly to draw her weekly pay check. Witnesses for defendant testified that prior to December 24, 1915, and during the time when plaintiff was acting parts in which she had been cast, she frequently arrived on the ground so late that her tardiness caused exasperating delays that threw the whole working organization out of joint, causing defendant considerable financial loss. Other actors and actresses, and persons employed in connection with rehearsals and work before the camera, arrived on the ground, as a rule, not later than 8:30 o'clock in the morning; while, according to defendant's witnesses, plaintiff frequently was as late as 10 and 11 o'clock in arriving on the scene of her duties. When not actually working for defendant, plaintiff did not remain in her home at Santa Monica all day long so that she might readily be communicated with

by telephone or other convenient means of communication, in the event that she might be needed at the studio to enact some rôle. * * *

On January 22, 1916, defendant caused to be delivered to plaintiff a letter—written and signed on the 13th—which is as follows:

"Miss Lola May: In the future it will be absolutely necessary that you report at the studio every morning not later than 8:30 A. M., *irrespective of whether you are cast or not,* and not absenting yourself when you think you are not cast, as you have taken upon yourself to do in the past. Yours very truly, E. H. Allen, Manager."

This order we shall designate as the order of January 22, 1916—the date of its delivery—though it was written and signed on the 13th. Whether this order is consistent with the written contract of employment, and whether it is a reasonable order, are the principal questions presented on this appeal. * * *

Plaintiff did not report at defendant's studio on the 24th, 25th, or 26th days of January, 1916. She was discharged on January 27th. * * *

The relation of master and servant which in contemplation of law existed between these parties, cast certain duties upon plaintiff, as the servant, which she was bound to fulfil and discharge; the principal one was that of obedience to all reasonable orders of the defendant, the master, not inconsistent with the contract. "A promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law." Lacy v. Getman, 119 N. Y. 115, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806. * * *

Disobedience of a reasonable order is a violation of duty which justifies a rescission by the master of the contract of employment and peremptory discharge of the servant. Jerome v. Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485; * * * The law is thus summarized in Fraser on Mast. & S. p. 71:

"Where a servant deliberately violates his master's orders, or refuses to obey them when given, he is clearly guilty of the grossest breach of contract. His duty is to obey the master in all things for which he became bound expressly, or in which obedience is implied from the nature of the service undertaken." * * *

We see nothing in the contract with which the order can be said to be inconsistent. By her contract plaintiff engaged to "enact rôles in the motion picture productions" of defendant. The order of January 22, 1916, did not require plaintiff to perform service of a kind other than or different from that called for by her contract of employment, namely, the enactment of rôles in motion pictures produced by defendant. The sole purpose of the order was to insure plaintiff's presence at a certain place, near the spot where the pictures were being filmed. * * *

We conclude, therefore, that the order to report at the studio every morning not later than 8:30 was consistent with the contract between the parties; that, if the circumstances were as described by defendant's witnesses, the order was reasonable and fair; and that * * * if

it be true, as testified by defendant's witnesses, that plaintiff was frequently tardy, and defendant, at times, had difficulty in reaching her by telephone in order to notify her to be present to enact her rôles, then the order was reasonable; and a willful disobedience of its terms would be good ground for plaintiff's discharge. * * *

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2. Principal's Liability to Reimburse Agent for Advances

D'ARCY v. LYLE.

Supreme Court of Pennsylvania, 1813. 5 Bin. 441.

[Plaintiff declared for money paid and expended, money lent and advanced, work, labor and services. At the trial there was a verdict for the plaintiff in the sum of $3500. Defendant moved for a new trial.]

The facts were as follows: Defendant sent plaintiff to Haiti, with a power of attorney to demand from Suckley & Co., heretofore defendant's agents at Haiti, all of defendant's goods remaining in their hands, and to settle all outstanding accounts. On the voyage, the plaintiff, in consequence of being chased by a French privateer, threw overboard, among other papers, the power of attorney. He stated this fact to Suckley & Co. upon his arrival, who consented to deliver up the goods, upon his promising to pay a balance which they alleged to be due from the defendant; and this being assented to by the plaintiff, they proceeded to deliver the goods. Before the delivery was complete, one Thomas Richardson attached them with other goods of Suckley & Co., to secure a debt due by them to the house of Knipping & Steinmetz of Charleston, for whom he was agent. The plaintiff interposed a claim on behalf of the defendant; and * * * the Chamber of Justice decreed that he should retain possession of the merchandise. [The plaintiff then sold the goods and sent the money to the defendant, at the same time resigning from his position as defendant's agent. Up to this time, General Dessalines, autocratic ruler of Haiti, acted as plaintiff's friend and sponsor. Within three months the government of Dessalines was overthrown and one Christophe succeeded to the dictatorship. Christophe it appears was a friend of Richardson; and on the accession of the new ruler to power] Richardson instituted a suit against the plaintiff in the Tribunal of Commerce, to recover from him the value of the goods, which by the decision of the Chamber of Justice had been decreed to him as the defendant's agent in 1804. * * * On the 14th of May [1805] the Tribunal of Commerce gave judgment for D'Arcy. [Here, however, Christophe interfered. He imprisoned D'Arcy's lawyer, and ordered that the case be tried by wager of battle, which he specified must be fatal to one of the parties; D'Arcy and Richardson to fight at six o'clock the next morning, Christophe to be there to see the affair settled. That night Christophe sent for D'Arcy, and the upshot of this meeting was that the next day, after

the court had rendered judgment in his favor, D'Arcy in open court retracted his defense, and consented that the judgment be reversed and that he pay to Richardson the value of the defendant's goods delivered to him by Suckley & Co. Plaintiff paid Richardson the amount, and on his return to the United States filed suit against the defendant for money paid out by an agent for his principal's use.]

TILGHMAN, C. J. * * * The confession of judgment was beyond all doubt extorted from the plaintiff by duress, and he did not yield to fears of which a man of reasonable firmness need be ashamed. The material fact on which this case turns is whether the transactions between the plaintiff and Richardson were on any private account of the plaintiff, or solely on account of the defendant [principal]. That was submitted to the jury, and we must now take for granted that the proceedings at the Cape * * * were in consequence of his having received possession of the defendant's goods from Suckley & Co. I take the law to be * * * that damages incurred by the agent in the course of the management of the principal's affairs, or in consequence of such management, are to be borne by the principal. It is objected that at the time when judgment was rendered against the plaintiff he was no longer an agent, having long before made up his accounts and transmitted the balance to the defendant. But this objection has no weight, if the judgment was but the consummation of the proceedings which were commenced during the agency. As such I view them, and I make no doubt but they were so considered by the jury. It is objected again, that no man is safe if he is to be responsible for an unknown amount, for any sums which his agent may consent to pay, in consequence of threats of unprincipled tyrants in foreign countries. Extreme cases may be supposed, which it will be time enough to decide when they occur. I beg it to be understood, that I give no opinion on a case where an agent should consent to pay a sum far exceeding the amount of the property in his hands. That is not the present case, for the property of the defendant, in the hands of the plaintiff in 1804, was estimated at $3,000. The cases cited by the defendant show that if the agent, on a journey on business of his principal, is robbed of his own money, the principal is not answerable. I agree to it, because the carrying of his own money was not necessarily connected with the business of his principal. So if he receives a wound, the principal is not bound to pay the expenses of his cure, because it is a personal risk which the agent takes upon himself. * * * In the case before us, the plaintiff has suffered damage without his own fault, on account of his agency, and the jury have indemnified him to an amount very little, if at all, exceeding the property in his hands, with interest and costs. I am of opinion that the verdict should not be set aside. * * *

New trial refused.[1]

[1] The opinions of Yeates and Brackenridge, JJ., are omitted.

SECTION 2.—IN TORT—LIABILITY OF MASTER TO SERVANT FOR INJURIES

1. Under the Common Law

Employer's Liability for Negligence.—Under the principles of the common law—that is, in the absence of statutory law on the subject—the employer is liable to the employee for injuries due to the negligence of the employer. It is the duty of the employer to use due care for the safety of his employees while they are performing their work. Such due care is that degree of care which a reasonably prudent person would exercise in like circumstances. This includes furnishing a reasonably safe place to work, reasonably safe tools and appliances, and in hiring reasonably careful men. Failure to observe the degree of care required, is negligence on the part of the employer; and if injury results therefrom, the employer is liable for the damage suffered.

Employer's Defenses.—In limitation of the employer's liability for negligence, there grew up in the law certain doctrines which constitute complete defenses to his liability. These are: (1) The defense of contributory negligence; (2) the defense of assumption of risk; and (3) the fellow-servant doctrine.

Defense of Contributory Negligence.—If the employer can prove that at the time of the injury the employee was himself guilty of negligence, and that his lack of care contributed to the injury, this will constitute a complete defense to the employer's liability. Even though the injury was caused by the employer's negligence, if, at the time of the injury and contributing thereto, the employee failed to exercise due care for his own safety, he cannot recover. In short, where the employee's negligence contributes to the injury, the employer is not liable.

Defense of Assumption of Risk.—Where the employer can show that the injury to the employee resulted from a danger or hazard which is common to the particular employment in which he was engaged, this will constitute a defense. The workman, in undertaking any employment, is taken to have assumed the ordinary risks of the employment. That in fact he might not or did not know of them is immaterial; he is conclusively presumed to know of all dangers inherent in the work he has undertaken. If the injury results from an ordinary hazard of the employment, the employer is not liable.

In addition, although the employee is not held to have assumed dangers unusual or extraordinary to the employment beyond his knowledge, still if he continues in the employment after learning of such extraordinary dangers, he is deemed to have assumed these also. Thus, under the doctrine of assumption of risk, for a workman to recover for injury caused by defective machinery, it is necessary for him to prove:

(1) That the appliance was defective; (2) that the employer was chargeable with knowledge of the defect; (3) that he, the employee, did not know, and in the exercise of ordinary care for his own safety could not have known, of the defective condition.

Fellow-Servant Doctrine.—The third defense open to the employer, the fellow-servant rule, relieves the employer from liability for all injuries to employees which result from the negligence of a fellow employee. The first case to lay down this principle was a case decided in England early in the nineteenth century, in which a butcher's helper was injured due to the carelessness of another of the butcher's employees. The court decided that, since there was no relation between the injury and fault on the part of the employer, there could be no liability. Up to the passage of workmen's compensation legislation, in England and America the employer was not liable to an employee for injury caused by a fellow employee.

Summary.—In the absence of statute, then, the employer is liable to his employee for damages for injuries received, only (1) if the injury was occasioned by the employer's negligence; (2) if the employee was himself not negligent; (3) if the accident was not due to the negligence of a fellow employee; and (4) if the accident was not one foreseeable as a hazard of the employment. In the event that any one of these conditions are lacking, the loss occasioned by the injury is borne entirely by the workman.

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2. Employer's Liability under Statutes

With the tremendous growth of cities and manufacturing, the common-law doctrine of employers' liability for negligence, with its defenses of contributory negligence, fellow-servants' negligence, and assumption of risk, became inadequate and inapplicable to modern conditions of employment. It began to be recognized that industrial accident loss should no longer be borne solely by the individual; that it was as much a charge upon the industry itself as the consumption of fuel and materials. Like any other item of the cost of production, loss of human power should enter into the cost price of the manufactured article, ultimately to be charged to the consumer, and the loss thus spread over society as a whole.

Federal Employers' Liability Statutes.—The national government was the first to change the common law doctrine by statute. Federal jurisdiction, however, extends only over interstate commerce; and it is only those employers and employees engaged in interstate commerce whose rights and liabilities are governed by the federal employers' liability statutes. 45 USCA §§ 51–59.

Moreover, the legislation passed by Congress on this subject went only part way in changing the common-law doctrine as to employers' liability. Although it abolishes the common-law defenses of contributory negligence, fellow-servant rule, and assumption of risk, it still leaves the element of negligence of the employer as an essential to the worker's right of recovery. For an employee engaged in interstate commerce to recover from his employer for an injury received in the employment, he still must prove that the injury was due to the employer's negligence.

The State Workmen's Compensation Statutes.—State investigations into the subject of industrial accident loss revealed the fact that in more than 80 per cent. of cases of injury to workmen arising out of the employment, the employer was not legally liable, and the employee received nothing in compensation for his loss. Recognizing that common-law principles were no longer adequate to deal with the modern situation, that in most cases the injured workmen and their families became objects of charity, and that industrial accident loss is properly a charge upon the cost of production of the manufactured article, beginning in 1910 the Legislatures of nearly all of the states passed workmen's compensation statutes, doing away entirely with the common-law rules of liability, and establishing new rules, new remedies, and new procedure.

When Common-Law Action Remains.—Even under compensation statutes, however, if the particular employment is not one covered by the act, the rights and liabilities of the parties are governed by the common-law doctrines as herein outlined.

WORKMEN'S COMPENSATION

CHAPTER 1

EMPLOYER'S LIABILITY TO PAY COMPENSATION

SECTION 1.—IN GENERAL

In broad outline, Workmen's Compensation Acts impose liability upon the employer to pay compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault or negligence as a cause. The language of a typical compensation statute in this regard is as follows:

"Be it enacted * * * that an employer in this state, who comes within the provisions of this act, must provide and pay compensation as stated herein, for accidental injuries sustained by any employee arising out of and in the course of the employment. * * *"

The conditions precedent to the employer's liability are then: (1) The employer and employee must both be under the act; (2) the relation of employer and employee must exist; (3) the injury must be accidental; and (4) the injury must arise out of and in the course of the employment.

The acts of the various states vary as to detail and manner of operation; but they are similar as to basic principles involved. Those above mentioned seem to be the storm centers out of which the greater portion of litigation under Workmen's Compensation Acts have arisen; and upon the construction given them by the courts depends an understanding of the operation of compensation law. It is obvious that on any detailed question the text of the act of the particular state and the decisions of its courts should be consulted.

SECTION 2.—ADMINISTRATION

A workmen's compensation law has as one of its essential purposes the establishment of a new method of procedure, whereby the long delays and high costs of recovery that obtained under the common-law system might be obviated. It was therefore necessary to create administrative bodies having jurisdiction over the operation of the compensation statutes. The administrative process of the compensation laws is one of their outstanding features. The method adopted in the statutes of nearly all of the states is the establishment of a Compensation Commission as a quasi judicial body empowered to decide all disputed questions of law and fact which arise between employer and employee in regard to such matters as are covered by the act.

The procedure before the Commission is most informal. The injured employee, who is denied compensation by his employer, may go in person to the offices of the Industrial Commission, where he may himself file his claim for compensation. Thereupon an immediate date for a hearing is set by the Commission and a notice thereof mailed to the employer. At the day and hour set the parties may appear, either in person or by counsel, and introduce evidence in their behalf. The proceedings are conducted with the utmost informality, there being but little similarity to judicial procedure. Action on any compensation claim may be secured with little or no delay, and at very small expense. Appeals may be taken from the decisions of the Commission to the courts.

SECTION 3.—WHO COMES UNDER THE ACT?

1. Hazardous Employments

Hazardous Employments Automatically Under The Act.—The majority of the Workmen's Compensation Acts make two great classifications of industries and employments, and therefore of employers and employees, as to whether or not they come under the compensation law. The first class includes all those who are engaged in hazardous employments. As to this class, the statutes are compulsory; and the employer and his employees are under and bound by the provisions of the compensation law, regardless of their wishes and without any right of election.

What Are Hazardous Employments?—The compensation statutes specifically enumerate those occupations which are declared hazardous, and therefore covered by the law without election. The sec-

tion of the Illinois act (Smith-Hurd Rev. St. 1927, c. 48, § 139), in this regard is typical, and an examination of its provisions will be instructive, although it must be borne in mind that on a particular question the statute of the state in question must be consulted.

"Sec. 3. The Provisions of this act * * * shall apply automatically and without election to the state, county, city, town, township, incorporated village or school district, * * * or municipal corporation, and to all employers and all their employees engaged in any department of the following enterprises * * * which are declared to be extra hazardous, namely:"

(1) All construction, including repair, remodeling, removing, demolition, electrical work.

(2) Carriage by land or water and loading or unloading in connection therewith, including the distribution of any commodity by horse drawn or motor driven vehicle where the employer employs more than three employees in the business.

(3) All warehouse operations.

(4) Mining, surface mining or quarrying.

(5) All enterprises where explosives, molten metals, injurious gases or vapors, or corrosive acids, are manufactured, used, generated, stored, or conveyed.

(6) All enterprises wherein machinery is used, now or hereafter subject to statutory regulations.

In determining whether any particular business or enterprise comes automatically under the act, regard is to be had for the particular circumstances. If the occupation is one of those specifically enumerated, no difficulty is presented. It is safe to assume that all construction work, mines, quarries, sawmills, bridge-building, trucking, teaming, manufacturing, warehouses, handling of explosives, molten metals, gases, corrosive acids, etc., are under compensation laws. And the final subsection, covering all enterprises wherein machinery is used subject to statutory regulation, takes in a vast number of enterprises not expressly mentioned; all enterprises in effect in which machinery is used. For example, the Illinois Supreme Court has held [1] that a manual training department of a township high school was an "enterprise" within the meaning of the Compensation Act. In this case a manual training teacher, in the performance of his teaching duties, was injured while operating a power-driven buzz saw, and it was held that he was entitled to recover compensation. The school district, by virtue of the machinery installed in the high school, was subject to the provisions of the compensation statute, though without knowledge of the fact.

Also all operations which are by their nature hazardous are subject to the compensation law, whether or not they are specifically mentioned in

[1] Board of Education v. Industrial Com., 301 Ill. 611, 134 N. E. 70 (1922).

the statute. Thus a detective employed as night watchman in guarding a building, who was shot by a burglar, was held entitled to compensation as being under the act, in spite of the fact that no mention is made therein of this occupation.

ILLINOIS PUBLISHING & PRINTING CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1921. 299 Ill. 189, 132 N. E. 511.

THOMPSON, J. Philip A. Coates, deceased, was employed by the Illinois Publishing & Printing Company as an advertising solicitor for the Chicago Herald and Examiner, a newspaper published by it. He went from place to place in the city of Chicago and elsewhere for the purpose of securing advertising to be published in said newspaper. * * * While he was driving on the public streets of Chicago, he was killed in a collision between his own car driven by him and another car driven by Abraham Rubenstein. * * *

Section 3 of the Compensation Act of 1919 [Laws 1919, p. 539] provides that the provisions of the act shall apply automatically and without election to all employers and their employees engaged in any of the enterprises or businesses which are declared by the act to be extra-hazardous. It is admitted that plaintiff in error is engaged in an enterprise in which statutory and municipal ordinance regulations are imposed for the regulating and guarding of machinery and appliances for the protection and safeguarding of its employees and the public. There are located in the ten-story building which it occupies, typesetting machines, printing presses and other machinery used in printing a newspaper, and electrically propelled elevators used for carrying passengers and freight from floor to floor. It is contended by plaintiff in error that the only employees covered by the act are those directly exposed to the hazards peculiar to the business or enterprise of the employer, and that it does not cover such employees as salesmen, bookkeepers and stenographers, who are not exposed to the special hazards. * * *

Under these elective statutes this court has held in several cases that some employees of an industry might be covered by the act while other employees engaged in a different branch of the business or enterprise might not be covered by the act. In Vaughan's Seed Store v. Simonini, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713, the employer had several branches or departments in its business. * * * Its election to be covered by the act was entirely voluntary, and the theory of the decision was that the employer ought not to be presumed to elect to provide and pay compensation according to the provisions of the act except as to that branch or department of its business which was declared by the statute to be hazardous. * * *

It seems to be well established by this court that it is the business or enterprise of the employer that controls. * * *

In the Suburban Ice Co. Case [274 Ill. 630, 139 N. E. 979] it was the machinery in the ice plant and the operation of the ice storage house that

brought the business of the employer within the act, but the employee's injury was not caused by the hazards peculiar to the ice plant or to the warehouse, but by the kick of a horse—a hazard common to all industries where horses are used. In the Gibson Case [276 Ill. 73, 114 N. E. 515] it was the handling of explosive materials that brought the employers under the act, but the employee was not injured by the explosion of gasoline, but by being run over by an empty gasoline tank wagon—a hazard common to all teamsters. In the Chicago Dry Kiln Co. Case [276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645] it was the machinery in the planing mill that brought the employer under the act, but the employee was not injured by this machinery, and his death was not due to a hazard peculiar to the business. In the Pekin Cooperage Co. Case [277 Ill. 53, 110 N. E. 128] the employer was brought under the act because power-driven machinery was used in its plant, but the employee was injured by being thrown onto a cement floor by fellow employees while waiting in line for his pay. In the Friebel Case [280 Ill. 76, 117 N. E. 467] the injury to the employee did not grow out of any of the hazards due to the business of operating a warehouse, but it was occasioned by a collision between a street car and a truck with which the employee was working; and in the Hahnemann Hospital Case [282 Ill. 316, 118 N. E. 767] it was not because the hospital building was seven stories high and had in it an electrically operated elevator that the employee was killed, but the death resulted from his slipping and falling into the basement, as he might have done in his own home. This court has therefore long ago established the proposition that the jurisdiction of the Industrial Commission is to be determined by the business or enterprise of the employer and not by the particular kind of work or the particular thing that the employee may be doing at the time of the injury. * * *

Judgment affirmed.

BOWMAN DAIRY v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1920. 292 Ill. 284, 126 N. E. 596.

STONE, J. * * * It appears from the evidence that the plaintiff in error is a company engaged in the distribution of milk and other dairy products in the city of Chicago and its suburbs. It maintains on Ridge avenue, in Evanston, a distributing station. This station is a two-story building, the first floor of which is occupied by a wagon wash room and refrigerating milk room. The branch offices of the company were on the second floor, and the horses owned by it and used at that station were kept in a stable on the second floor. It appears that the duties of Pelkmann consisted in harnessing and hitching a horse to his milk wagon and driving to a car standing upon a side track, in which the milk and cream were shipped to the station from bottling plants. He would secure his load of milk and cream from the employees in the car, who would hand the same to him, and upon loading his wagon he would drive to the homes of his customers and distribute the product. * * *

Defendant in error contends that the business of the plaintiff in error is extrahazardous within paragraph 8 of section 3 of the act, which provides: "In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extrahazardous." * * *

In Hahnemann Hospital v. Industrial Board, 282 Ill. 316, 118 N. E. 767, where an employee of a hospital, whose duties required him to go to all parts of the building and supervise and assist in caring for the machinery, elevators, etc., in the hospital, which was a seven-story building, it was held that, since an ordinance of the city of Chicago required elevators and fire escapes in buildings more than two stories in height, such ordinance brought the hospital within paragraph 8 of section 3 of the Compensation Act; the court there saying: "The statute does not undertake to specifically define or specifically describe every business, occupation or enterprise that it classifies as extrahazardous, but it is clear that no business should be held to be extrahazardous unless it is, in fact, extrahazardous per se or is rendered extrahazardous when conducted under the conditions and surroundings named in the statute."

The ordinance introduced regulates the width of stalls and passageways in all private, livery, sale or boarding stables. This ordinance shows on its face, therefore, that it is a building regulation for any and all horse stables to be erected in Evanston. Applying these rules, we are of the opinion that the ordinance regulating the size of stalls or the size of passageways between such stalls in any barn in the city of Evanston is not such as was contemplated by the Legislature as imposed "for the protection and safeguarding of the employees or the public therein," so as to bring the owner thereof within the classification of an extrahazardous occupation. * * *

Judgment reversed.

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2. Nonhazardous Employments under the Act Only by Election

The great majority of Workmen's Compensation Acts are elective as to employers engaged in nonhazardous employments. All employments not declared by the statute as hazardous, and not hazardous per se, do not come within the provisions of compensation law, save by the voluntary desire and election of employer and employee. In twelve states, election to operate under the provisions of the compensation law is presumed, both as to employer and employee, in the absence of notice to the contrary. In Oregon and Illinois, the employer in a nonhazardous employment must file written notice of his intention to come

under the act. As to the employee, in all states he is presumed to have accepted the act, unless he files notice to the contrary.

Most statutes deprive the employer of the common-law defenses in the event that he has elected not to be bound by the provisions of the compensation law. The situation, then, is that the employer is deprived of the advantage of limited liability as provided in the act, and the amount of damage will be fixed by the jury, but that, on the other hand, the liability of the employer will depend upon proof of his negligence.

Nonhazardous Work in Hazardous Employment.—In general, it may be said that an employee engaged in one of the employments named in the Compensation Act can recover thereunder, although injured while doing work of a kind not ordinarily included in such an employment. For example, a draftsman employed by a building contractor, who suffers an injury to his ankle against the edge of the drafting table, from which tuberculosis of the bone develops, would be entitled to claim compensation under the act, though the work of drafting is nonhazardous. It is sufficient that the general employment is hazardous.

Hazardous Work in Nonhazardous Employment.—Where the general employment is nonhazardous, and there was no election to come under the act, an injury received by an employee is not compensable. But, where the injury was incurred while the employee was doing hazardous work, then the fact that the principal employment was nonhazardous does not govern, and the employee will be entitled to compensation.

WENDT v. INDUSTRIAL INSURANCE COMMISSION OF WASHINGTON.

Supreme Court of Washington, 1914. 80 Wash. 111, 141 P. 311.

[From the evidence it appeared that the defendant, a department store in Seattle, Washington, kept a repair shop where their own vehicles were kept in order. A carpenter, while turning on a switch to start an emery wheel, so that he could sharpen a tool, received an electric shock which caused his death. It was urged that the defendant employer was not liable under the Compensation Act (Laws 1911, c. 74), for the reason that the general merchandising business was not hazardous, within the meaning of the Washington act, and there was no election to be bound by the provisions of the act.]

MORRIS, J. * * * If we could so construe the act that the extrahazardous character of the employer's business was to be determined by the business he was principally engaged in, we might accept the finding of the commission; but the act, as we have seen, recognizes the fact that the same employer may conduct different departments of business, some of which fall within the act, some of which do not. And in this connection it matters not which is the principal business and which is the incidental business. If the employer conducts any department

of his business, whether large or small, as an extrahazardous business within the meaning and defined terms of this act, his workmen would come within the class designated by the act, and be entitled to the protection of the act. * * *

3. Agricultural Employment

Farmers or agriculturists and laborers employed in agriculture are expressly excepted from the operation of almost all of the Compensation Acts. Whether or not a farmer is engaged in a hazardous enterprise, he is not bound to pay compensation for injuries received by his employees. Even where a farmer operates a threshing machine on his farm, and one of his laborers is injured or killed by the machine, the farmer will not be liable under the compensation law. Farmers may elect to come under the compensation law, for the purpose of securing the limited liability thereby imposed, for if they are not under the act they are governed by the common-law liability of master to servant for injuries received by the latter resulting from the master's negligence, and there is no limit fixed by the law to a jury's verdict affixing damages.

4. Independent Contractors

Liability under compensation statutes depends upon the existence of the relation of employer and employee. Wherever the person injured stands in the relation of independent contractor, rather than employee, there is no liability under compensation law.

POWLEY v. VIVIAN & CO., Inc., et al.

Supreme Court of New York, Appellate Division, Third Department, 1915. 169 App. Div. 170, 154 N. Y. S. 426.

Lyon, J. The single question for determination upon this appeal is whether the claimant, at the time he was injured, was an employé of the defendant, Vivian & Co., Incorporated, within the meaning of the Workmen's Compensation Law, or was an independent contractor. Vivian & Co., Incorporated, hereinafter mentioned as "Vivian Co.," was engaged, under a contract with one Coen, in dredging waters at Oyster Bay, N. Y., for which service it was to be paid for the quantity of sand and gravel removed. It was the owner of scows within which to dump and carry away the material dredged. The claimant was the owner of a dredging machine and appurtenances, and of the cooking, culinary, and commissary equipment thereof.

In July, 1914, the claimant and Vivian Co. entered into an agreement in writing by which the claimant agreed to furnish his dredge with its equipment and appurtenances in good working order to Vivian Co. for the use of Vivian Co. in its dredging operations during the continuance of an assigned contract between Vivian Co. and Coen; such lease of said dredge under the terms of the agreement not to extend beyond three years, the claimant further agreeing to turn over and deliver to Vivian Co. all the cooking, culinary, and commissary department and equipment thereof then on the dredge for the use of Vivian Co. during the dredging operations. The agreement further provided that Vivian Co. was to pay the claimant for the use of the dredge and commissary department, and for the services of the claimant (or of such competent man as he might select to take his place in charge of said dredge and the crew thereof), the sum of $500 per month, and, in addition thereto, to pay the claimant 3 cents per cubic yard for all yardage delivered on scows in excess of 20,000 cubic yards per month from the dredging operations of Vivian Co. under the Coen contract, and in determining such yardage the measurements of the sand and gravel dredged under the Coen contract for which Vivian Co. received payment were to be the standard on which such compensation, if any, should be paid by Vivian Co. to the claimant. Vivian Co. was to furnish a monthly report of the dredged material removed, payment for the rental and any yardage to be made every month. The claimant was to pay for all machinery repairs and new parts which might be required from time to time for the dredge. Vivian Co. was to pay the wages of the crew, expenses of the commissary department or the board of the crew, and for all fuel, oil, and operating expenses of every kind. * * *

In accordance with this agreement, the claimant furnished the dredge with its equipment, together with the personal property mentioned in the agreement, and the performance of the work specified in the Coen contract was entered upon. Following the injury to claimant, the management of the operation of the dredge was continued by a person employed by the claimant. For use in connection with the dredging operations was a motor launch of which Vivian Co. was the lessee, from some person other than the claimant, which was used in carrying the men and supplies between the shore and the dredge, and was used generally wherever needed in connection with the dredging operations. In September, 1914, the claimant, in order to crank the motor, took hold of the cranking handle upon the flywheel. The motor back-fired, and the handle struck the claimant, breaking his right arm at the wrist. This is the injury for which compensation is sought.

The Workmen's Compensation Commission found as conclusions of fact that on the day the claimant received his injuries, he was employed by Vivian Co. as an operator of a dredging machine; that on said date, while claimant was attempting to start a motor on a motor boat which was operated in connection with the dredge, the motor back-fired, and broke his right wrist; that such injuries were accidental injuries, and arose out of and in the course of his employment;

and that the claim came within the provisions of the Compensation Law. The Commission, having fixed the average weekly wages of claimant at $26.54, made an award to him of $15 per week for 6 weeks, beginning at the expiration of 2 weeks from the happening of the injury. From such award, this appeal has been taken by both the employer and the insurer.

Manifestly the first question to be considered is whether under the agreement the claimant was an employé or an independent contractor. Section 3 of the Compensation Law defines the term "employer," as used in the act, as a "* * * corporation * * * employing workmen in hazardous employments," and defines the term "employé" as a "* * * person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same. * * *" An "independent contractor" is defined as one who exercises an independent employment and contracts to do a piece of work according to his own method and without being subject to the control of his employer, save as to the results of his work. Alexander v. R. A. Sherman Sons Co., 86 Conn. 292, 85 A. 514. The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it. Shearman & Redfield on Negligence (6th Ed.) § 164; * * * Andrews v. Boedecker, 17 Ill. App. 213. An independent contractor is not in any legal sense a servant of his employer, but is one exercising an independent employment under a contract to do certain work by his own methods without subjection to the control of his employer, except as to the product or result of the work. * * *

While frequently it is difficult to distinguish between the position of servant, and that of a person exercising an independent calling, the evidence in this case strongly tends to relieve the uncertainty. The claimant was a contractor of 20 years' experience in dredging operations, and concededly thoroughly competent to manage the operation of a dredge. While he was required to bear the expense of necessary repairs and new parts to the machinery, he had no power to hire or discharge a man, and paid no part of the dredging expenses. Vivian Co. paid the wages of the crew, the expenses of the commissary department, or the board of the crew, and for all fuel, oil, and operating expenses of every kind. That the relation of the claimant to Vivian Co. in hiring out with his dredge was that of a person exercising an independent calling, and not that of a mere employé, is manifest throughout the agreement. This is particularly apparent from the clauses before quoted, by which no right of control of the management of the operation of the dredge was vested in Vivian Co., but was vested wholly in the claimant or in his substitute; that Vivian Co. should use no other dredge so long as the claimant's dredge was able to do the work required by the Coen contract; that neither party should be liable to

the other, or to third parties, for the negligent acts or omissions of the other; and that the obligations and benefits of the agreement should be binding upon and extend to the heirs, representatives, and assigns of the respective parties, thus apparently recognizing the right of either party to voluntarily dispose of his or its interest in the contract, and providing for its continuance in that event, or in the event of the death of the claimant. The fact that Vivian Co. may from time to time have directed the particular places at which the sand and gravel should be taken out was in no way inconsistent with the claimant's relation being that of an independent contractor. "The mere fact of direction as to things to be done, without control over the methods or means of doing them, does not make a contractor a servant." Shearman & Redfield on Neg. § 164. The mere fact that a person hiring a livery team may direct the driver where to go, and at what speed, does not create the relation of master and servant. Kellogg v. Church Charity Foundation, 203 N. Y. 191, 197, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883. The provisions of the agreement and the acts of the parties under it, as disclosed by the record, are consistent only with the relation of the claimant being that of a person exercising an independent calling. To that relation, by itself, the Compensation Law does not apply.

However, at the time of sustaining the injury the claimant was not engaged in the specific work of managing the operation of the dredge. He was necessarily, he says, transporting supplies to the dredge when he sustained the injury. Vivian Co. was obligated by the agreement to furnish these supplies. The launch man was its employé, and it was its duty to furnish a man to run the launch. In performing that duty Vivian Co. failed, and, as the claimant says, "I had to get the supplies myself." In the performance of that act the claimant is to be regarded, not as an independent contractor, but as an employé, within the intent of the Workmen's Compensation Law. "One who has an independent business, and generally serves only in the capacity of a contractor, may abandon that character for a time, and become a mere servant or agent, and this, too, without doing work of a different nature from that to which he is accustomed; * * * and he may even be a contractor as to part of his service and a servant as to part." Shearman & Redfield on Neg. (6th Ed.) § 165. Where an independent contractor had finished a building, it was held that in throwing waste material from the roof he was acting as a servant of the owner. Swart v. Justh, 24 App. D. C. 596.

The provision in the agreement by which each party exempted the other from all acts of fault or omission, even if in terms applicable to a claim of this character, would be wholly ineffective. An agreement by an employé to waive his right to compensation under the Workmen's Compensation Law is not only void as against public policy, but also under the express provision of section 32 of that act. * * *

The award should therefore be affirmed.[2]

[2] A quarryman, furnishing his own blasting materials and teams, and paid by the cord, was held to be an independent contractor, and not an employee, as was also the decision as to a taxicab driver, receiving one-fourth of the pro-

5. Employees Engaged in Interstate Commerce

Employees engaged in interstate commerce do not come under the provisions of the state Compensation Acts. The Constitution of the United States gave to Congress the right to regulate interstate commerce, and since Congress has enacted the Federal Employers' Liability Act (45 USCA §§ 51–59), the provisions of that law apply exclusively. As to all employees engaged in intrastate commerce, on the other hand, the state compensation law governs. The problem, then, in each case, is to determine whether the commerce was inter or intra state.

The Federal Employers' Liability Act provides compensation for employees of interstate carriers only where the injury resulted from the employer's negligence. The state compensation laws, however, provide compensation to the injured employee, irrespective of fault; the question as to whether the employer was negligent or not is wholly immaterial. Therefore, where an employee of a railroad suffers an injury which is wholly accidental, not traceable to any fault on the part of the employer, the question as to whether the employee was engaged in inter or intra state commerce becomes of vital importance. If he were engaged in interstate commerce, his rights are governed by the Federal Employers' Liability Act, and, there being no negligence, there is no liability. But, if his work were intrastate in character, he could recover compensation under the Compensation Act irrespective of negligence.

ERIE R. CO. v. COLLINS.

Supreme Court of the United States, 1920. 253 U. S. 77, 40 S. Ct. 450, 64 L. Ed. 790.

Mr. Justice McKenna delivered the opinion of the court.

* * * December 25, 1915, and prior thereto, defendant was an operator of a steam railroad and engaged in interstate commerce. On and prior to that date plaintiff as an employé of defendant operated a signaling tower and water tank in the town of Burns, N. Y., the tower being used for the operation of trains in interstate and intrastate commerce. The tank was used for supplying the locomotives of the trains with water, which was pumped from a closeby well into the tank by a gasoline engine which plaintiff ran.

In the nighttime of December 25, 1915, while plaintiff was engaged in starting the engine the gasoline suddenly exploded burning him and seriously and painfully and permanently injuring him, causing him

ceeds for his services in operating the company's car. The question is one of intention, to be ascertained from the circumstances on the basis of the test of control.

immediate and permanent suffering and the expenditure of large sums of money, by all of which he was damaged in the sum of $25,000.

The engine was defective, which was the cause of the explosion, plaintiff being guilty of no negligence. * * *

A trial was had to a jury, during the course of which it was stipulated that at the time of plaintiff's injury and prior thereto "trains carrying interstate commerce ran daily" and at such times "water from the water tank was supplied daily in part to defendant's engines engaged in interstate commerce and in part to engines hauling intrastate freight." * * *

The jury returned a verdict for plaintiff in the sum of $15,000 upon which judgment was entered against motion for arrest and new trial.

Error was then prosecuted to the Court of Appeals, which court affirmed the judgment, and to review its action this certiorari was granted. * * *

But first as to the facts in this: Defendant is an interstate railroad and upon its line running from other states to New York it operated in New York a signal tower and switches to attend which plaintiff was employed. It also had near the tower a pumping station, consisting of water tank, and a gasoline engine for pumping purposes through which instrumentalities water was supplied to its engines in whichever commerce engaged. While in attendance at the pumping station plaintiff was injured. And such is the case, that is, while in attendance at the pumping station, it being his duty to so attend, was he injured in interstate commerce?

It can hardly be contended that while plaintiff was engaged in the signal tower he was not engaged in interstate commerce, though he may have on occasion signaled the approach or departure of intrastate trains. But it is contended that when he descended from the tower and went to the pumping station he put off an interstate character and took on one of intrastate quality or, it may be, was divested of both and sank into undesignated employment. A rather abrupt transition it would seem at first blush and, if of determining influence, would subject the Employers' Liability Act to rapid changes of application, plaintiff being within it at one point of time and without it at another—within it when on the signal tower, but without it when in the pump house, though in both places being concerned with trains engaged in interstate commerce. * * *

In Pedersen v. D., L. & W. R. R. Co. [229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153] it was held that one carrying bolts to be used in repairing an interstate railroad, and who was injured by an interstate train, was entitled to invoke the Employers' Liability Act [45 USCA §§ 51–59]. In other words, that one employed upon an instrumentality of interstate commerce was employed in interstate commerce. And it was said, citing cases:

"The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged."

In the Yurkonis Case [238 U. S. 439, 35 S. Ct. 902, 59 L. Ed. 1397] the injury complained of happened to Yurkonis on a mine or colliery

of the railroad by the explosion of gases when Yurkonis was engaged in and about the performance of his duties. It was held that an injury so received, though the coal was destined for use in interstate commerce, was not one occurring in such commerce.

In Roush v. B. & O. R. R. Co. (D. C.) 243 F. 712, the decision was that one employed in operating a pumping station which furnished water to interstate and intrastate roads was engaged in work incidental to interstate commerce, the court deducing that conclusion from cases from which it liberally quoted. * * *

In the Puckett Case [244 U. S. 571, 37 S. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69] an employé (car inspector) going to the relief of another employé stumbled over some large clinkers in his path while carrying a jack for raising a derailed car. It was decided that he was engaged in interstate commerce, the purpose being to open the way for interstate transportation.

These, then, being the cases, what do they afford in the solution of the case at bar? As we have said regarding the essential character of the two commerces, the differences between them is easily recognized and expressed, but, as we have also said, whether at a given time particular instrumentalities or employment may be assigned to one or the other may not be easy, and of this the cases are illustrative. What is their determining principle?

In the Pedersen Case it was said that the questions which naturally arise: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?"

Or as said in Shanks v. D., L. & W. R. R. Co., supra [239 U. S. 556, 36 S. Ct. 188, 60 L. Ed 436, L. R. A. 1916C, 797], was the "work so closely related to it [interstate commerce] as to be practically a part of it?" The answer must be in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes therefore within the indicated test. It may be said however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as were demanded, and the test of the cases satisfied. * * *

Judgment affirmed.

RAYMOND v. CHICAGO, M. & ST. P. R. CO.

Supreme Court of the United States, 1917. 243 U. S. 43, 37 S. Ct. 268, 61 L. Ed. 583.

Mr. Chief Justice WHITE delivered the opinion of the court.

Raymond, the plaintiff in error, sued the railway company, a foreign corporation doing business in Washington, to recover damages resulting from injuries sustained by him while in its employ. The pe-

tition alleged that the defendant operated an interstate commerce railroad between Chicago and Seattle, and that, for the purpose of shortening its main line and making more efficient and expenditious its freight and passenger service, was engaged in cutting a tunnel through the mountain between Horrick's Spur and Rockdale, in Washington. It was averred that plaintiff was employed by the defendant in the tunnel as a laborer, and that, while he was at work, his pick struck a charge of dynamite which, through the defendant's negligence, had not been removed, and that from the explosion which followed he has sustained serious injuries.

The defendant's answer contained a general denial and alleged that at the time and place of the accident the railroad and Raymond were not engaged in interstate commerce, since the tunnel was only partially bored, and hence not in use as an instrumentality of interstate commerce. It was further alleged that the court was without jurisdiction to hear the cause because of the provisions of the Washington Workmen's Compensation Act (Laws 1911, c. 74), with whose requirements the defendant had fully complied. The reply of the plaintiff admitted the facts alleged in the answer, but denied that they constituted defenses to the action.

The trial court entered a judgment for the defendant on the pleadings, and this writ of error is prosecuted to a judgment of the court below, affirming such action. 233 F. 239, 147 C. C. A. 245.

Considering the suit as based upon the Federal Employers' Liability Act, it is certain, under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that, under the facts as alleged, Raymond and the railway company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act. * * *

It is also certain that if the petition be treated as alleging a cause of action under the common law, the court below was without authority to afford relief, as that result could only be attained under the local law, in accordance with the provisions of the Washington Workmen's Compensation Act, which has this day been decided to be not repugnant to the Constitution of the United States. Mountain Timber Co v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642. And this result is controlling even although it be conceded that the railroad company was, in a general sense, engaged in interstate commerce, since it has been also this day decided that that fact does not prevent the operation of a state Workmen's Compensation Act. New York Cent. R. Co. v. White, 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.

Affirmed.

6. Employees under Admiralty Jurisdiction

In addition to interstate commerce, admiralty jurisdiction by the Constitution of the United States is placed within the control of the federal government, and is therefore exclusive of state statutes. Thus an employee, injured while engaged in work connected with the operation or maintenance of agencies of commerce on navigable waters, could recover from his employer only under the common-law doctrine of liability for negligence, and not under the state workmen's compensation statute. The chief difficulty is encountered in determining and applying the test of admiralty jurisdiction.

STATE INDUSTRIAL COMMISSION OF NEW YORK v. NORDENHOLT CORPORATION et al.

Supreme Court of the United States. 1922. 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013.

Mr. Justice McReynolds delivered the opinion of the court.

Sebastiana Insana, mother of Guiseppe Insana, asked of the New York State Industrial Commission an allowance under the Workmen's Compensation Law (Consol. Laws, c. 67), on account of her son's death, which she claimed resulted from accidental injuries received May 15, 1918, in the course of his employment as a longshoreman by the Nordenholt Corporation then unloading a vessel lying in navigable waters at Brooklyn. The cargo consisted of bags of cement. These were hoisted to the dock and there tiered up by Insana and other longshoremen. While thus engaged, he slipped and fell on the dock.

The Commission found "the accidental injuries which the said deceased sustained while working for his employer when he fell from the pile of bags to the floor were the activating cause of his death, and his death was a direct result of the injuries sustained by him while engaged in the regular course of his employment," and awarded compensation as specified by the statute. Upon authority of Matter of Keator v. Rock Plaster Manufacturing Co., 224 N. Y. 540, 120 N. E. 56, and Matter of Anderson v. Johnson Lighterage Co., 224 N. Y. 539, 120 N. E. 55, the Appellate Division reversed the award (Insana v. Nordenholt Corporation, 195 App. Div. 913, 185 N. Y. S. 933), and the Court of Appeals affirmed its action, without opinion, October 25, 1921 (232 N. Y. 507, 134 N. E. 549).

In both the Matter of Keator and of Anderson, the employee suffered injuries on land while helping to unload a vessel lying in navigable waters. The Court of Appeals held, when so injured, he was performing a maritime contract, and that for reasons stated in Matter of Doey v. Howland Co., Inc., 224 N. Y. 30, 120 N. E. 53, the Industrial Commission had no jurisdiction to make an award. While making repairs

on an ocean-going vessel lying at the dock in navigable waters, Doey fell down the hatchway and sustained fatal injuries. The Appellate Division reversed an award of compensation, and the Court of Appeals affirmed its action, holding that, as Doey was performing a maritime contract, the Commission had no jurisdiction, under the doctrine of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. * * *

An award to Newham, injured on the dock while checking freight and doing work similar to that of a foreman of stevedores was set aside in Newham v. Chile Exploration Co., 232 N. Y. 37, 133 N. E. 120 (October 18, 1921). The court said:

"We have held in Matter of Doey v. Howland Co., 224 N. Y. 30 [120 N. E. 53], and in Matter of Anderson v. Johnson Lighterage Co., 224 N. Y. 539 [120 N. E. 55], and in Matter of Keator v. Rock Plaster Manufacturing Co., 224 N. Y. 540 [120 N. E. 56], that, if the employee was engaged at the time of his injury in the performance of a maritime contract, the state did not have jurisdiction of the matter, and the Workmen's Compensation Law did not apply. This is the deduction which we have made from the cases of Southern Pacific Co. v. Jensen, 244 U. S. 205 [37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900], and Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 [40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145]."

The court below has made deductions from Southern Pacific Co. v. Jensen, Clyde Steamship Co. v. Walker, and Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, which we think are unwarranted, and has proceeded upon an erroneous view of the federal law.

When an employee working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.

The injuries out of which Southern Pacific Co. v. Jensen arose occurred on navigable waters, and the consequent rights and liabilities of the parties were prescribed by the maritime law. The question there was whether these rules could be superseded by the workmen's compensation statute of the state, and this court held they could not. * * *

In Grant Smith-Porter Ship Co. v. Rhode [257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321], a carpenter proceeding in admiralty sought damages for injuries received while at work on a partially completed vessel lying in the Willamette river. The Oregon Workmen's Compensation Law prescribed an exclusive remedy, and the question presented was whether to give it effect would work material prejudice to the general maritime law. The accident occurred on navigable waters and the cause

was of a kind ordinarily within the admiralty jurisdiction. Neither the general employment contracted for nor the workman's activities at the time had any direct relation to navigation or commerce—it was essentially a local matter—and we said:

"Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. * * *

"In Western Fuel Company v. Garcia [257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210], we recently pointed out that as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle. The statute of the state applies and defines the rights and liabilities of the parties. The employee may assert his claim against the industrial accident fund, to which both he and the employer have contributed as provided by the statute, but he cannot recover damages in an admiralty court."

Insana was injured upon the dock, an extension of the land (Cleveland, etc., R. R. Co. v. Cleveland S. S. Co., 208 U. S. 316, 28 S. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215), and certainly prior to the Workmen's Compensation Act the employer's liability for damages would have depended upon the common law and the state statutes. Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law. And this is true whether awards under the act are made as upon implied agreements or otherwise. The stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land. In Jensen's Case, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antagonism exists. There is no pertinent federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law. Compare New York Central R. R. Co. v. Winfield, 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139.

The judgment of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

SECTION 4.—THE INJURY MUST BE ACCIDENTAL

The Workmen's Compensation Acts of the various states provide compensation only for "accidental injuries arising out of and in the course of the employment." There is a clear distinction between a "personal" injury and an "accidental" injury, and liability to pay compensation is imposed only for the latter. Thus suicide and self-inflicted injuries are not compensable, for they are not accidental.

MATTHIESSEN & HEGELER ZINC CO. v. INDUSTRIAL BOARD OF ILLINOIS et al.

Supreme Court of Illinois, 1918. 284 Ill. 378, 120 N. E. 249.

[Adrian had worked for fifteen years as fireman at the furnaces in a smelter. On the morning of October 6, 1914, he said that he did not feel like going to work. Nevertheless he went, and worked until 2 o'clock when he came home sick. October 14, he died.]

CARTWRIGHT, J. * * * The petition filed with the Industrial Board based the claim for compensation upon the ground that Adrian absorbed such a quantity of lead that he was poisoned and his death ensued. * * * The finding of the board was that the death was due to acute arsenical poisoning not of a chronic nature, or a culmination of a gradual development of a long course of poisoning.

The objections of the plaintiff in error to the judgment are two: First that the Workmen's Compensation Act [Hurd's Rev. St. 1917, c. 48, § 126 et seq.] only provides compensation for accidental injuries and there was no evidence that any accident happened to Adrian; second that Adrian's death was caused by an occupational disease, which is not accidental within the meaning of the act.

The title of the Workmen's Compensation Act, which by the constitution must express the subject of the act, shows the subject to be the promotion of general welfare by providing compensation for accidental injuries or death suffered in the course of employment. Section 1 provides that any employer may elect to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment, according to the provisions of the act. Section 24 provides for notice to the employer not less than thirty days after the accident, and section 30 makes it the duty of every employer to make a report to the Industrial Board of all accidental injuries so that by the title and provisions of the act compensation is only to be awarded for an injury or death which is accidental or the result of an accident within the meaning of those words as used in the act. The word "accident" is not a technical legal term

with a clearly defined meaning, and no legal definition has ever been given which has been found both exact and comprehensive as applied to all circumstances. Different definitions are given, with a very full citation of cases, in 1 Corpus Juris, 390. Anything that happens without design is commonly called an accident, and at least in the popular acceptation of the word any event which is unforeseen and not expected by the person to whom it happens is included in the term.

Different meanings are given to the word where it is made the ground for equity jurisdiction and where it occurs in accident insurance, and as applied to injuries to a servant without negligence of the master and for which he has not been held liable. The meaning of the word as used in the Workmen's Compensation Act is necessarily influenced by the various provisions of the act and the purpose of its enactment, and cannot be determined, alone, from any definition found in a dictionary. The act was designed as a substitute for previous rights of action of employees against employers and to cover the whole ground of the liabilities of the master, and it has been so regarded by all courts. * * * The words "accident" and "accidental injury" imply, and the provisions for notice to the employer within thirty days after an accident and his report to the Industrial Board of accidental injuries show, that an injury, to be accidental or the result of an accident, must be traceable to a definite time, place and cause, but if there is such a definite time, place and cause and the injury occurs in the course of the employment the injury is accidental within the meaning of the act and the obligation to provide and pay compensation arises. While it is not intended, and perhaps not possible, to give a definition of the words used in the act as applied to all possible circumstances, it may safely be said that an injury is accidental, within the meaning of the act, which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee.

In this case there was evidence from which the Industrial Board was warranted in finding that on October 6, 1914, in the course of the employment of Adrian he contracted arsenical poisoning which resulted in his death. It is true that Adrian had been exposed to practically the same conditions for many years without injury, but it would not be unreasonable to conclude that his immunity was because of the state of his health and his ability to resist the deleterious effect of the gases and fumes over which he worked, but this time his physical condition was such as to make him susceptible to arsenical poisoning in such a degree as to bring on his fatal illness and death. There was sufficient competent evidence before the board to sustain the finding and it cannot be disturbed.

The second objection to the judgment is that Adrian died from an occupational disease incident to the business of smelting zinc. A disability caused in that way or from that source is not to be regarded as an accident, because such a disease has its inception in the occupation and develops over a long period of time from the nature of the occupation and not from any unusual or unforeseen cause or event. For the prevention of such diseases there is a statute requiring the employer

to use certain precautions for the safety of the employee, and an action may be maintained against the employer for failure to comply with the provisions of the act. Wilcox v. International Harvester Co., 278 Ill. 465, 116 N. E. 151. For such failure the injured employee is not confined to the compensation provided by the Workmen's Compensation Act nor limited by the amount provided by the act. * * *

Judgment affirmed.[3]

E. BAGGOT CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1919. 290 Ill. 530, 125 N. E. 254, 7 A. L. R. 1611.

THOMPSON, J. * * * The windlass was operated by the two men, deceased turning one handle and Brodie the other. The last load of pipe hauled up by these men weighed between 250 and 300 pounds. After the pipe was landed on the sixth floor, and while Brodie was untying the rope, deceased started to walk away from the windlass and was seen to be spitting blood. * * * Nothing unusual happened while the work of lifting this last load of pipe was in progress. The work was heavy, but it was the same kind of work that the two men had been doing for a couple of days. The hemorrhages recurred from time to time until October 8, when deceased died. A post mortem examination disclosed a large longitudinal tear and several smaller transverse tears in the walls of the aorta. Prior to September 26, deceased was a strong, healthy man, and had never suffered from hemorrhages or any trouble with his heart or lungs.

Plaintiff in error contends that there is no evidence to support the award of the Industrial Commission, for the reason that there is no competent evidence to support a finding that deceased sustained an accidental injury arising out of and in the course of his employment. * * * In Schroetke v. Jackson-Church Co., 193 Mich. 616, 160 N. W. 383, L. R. A. 1917D, 64, the Supreme Court of Michigan reviews at length decisions on the question of what constitutes an accident under compensation acts similar to ours, and it there holds that where an aged watchman, whose duties were to guard the plant and give alarms of fire, had been afflicted with heart disease, and on discovering a fire

[3] Occupational diseases, such as lead poisoning, brass poisoning, arsenical poisoning, of long duration, are not accidental injuries, compensable under the Compensation Acts, because disease cannot be considered an accidental injury, in the sense of an unexpected or unlooked-for happening occurring at a definite time. The Michigan act (Pub. Acts Ex. Sess. 1912, No. 10), as construed in Adams v. Acme White Lead Works, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283, Ann. Cas. 1916D, 689 (1914), was held not to cover occupational diseases, for the reason that the act provides compensation only for accidental injuries. The English Compensation Act did not at first apply to occupational diseases, but in 1906 it was amended so as expressly to declare "diseases due to the nature of the employment" accidental injuries and compensable. The Illinois act was amended similarly in 1925. Laws Ill. 1925, p. 378.

Those compensation statutes which provide compensation for "personal" rather than "accidental" injuries, such as the Massachusetts act (G. L. c. 152, § 1 et seq.], have been held to include occupational disease.

and giving warning and attempting to extinguish the fire became excited and died from heart failure, his death was accidental. In Gilliland v. Ash Grove Lime & Portland Cement Co., 104 Kan. 771, 180 P. 793, the Supreme Court of Kansas had under consideration a case quite similar to the case at bar. There a workman's employment required him to break rock in a quarry with a 16-pound sledge and load the rock into a car. At noon he was in apparent good health and spirits. In the afternoon, while at his working place, and shortly after he had been seen beating a large rock with his sledge, he suffered a pulmonary hemorrhage, from which he died before medical aid could reach him. He had been working in the quarry for several months, and before that had worked for three years in the sacking department of a cement plant. The court, after reviewing the authorities, held that the evidence warranted a finding that the physical structure of the man gave way under the stress of his usual labor, and that the workman did not know, or in any event was inattentive to, the limited power of his blood vessels to resist blood pressure aggravated by vigorous muscular effort. This breaking down of a part of this man's body was held to be an accident.

In the instant case all the characteristics of an accident were present. The occurrence was sudden, unexpected and undesigned by the workman. The circumstances were clearly such that the commission was justified in finding that the hemorrhage was due to blood pressure intensified by vigorous muscular exertion. Relating the hemorrhage to physical exertion, rupture of the aorta by force from within was as distinctly traumatic as if the canal had been severed by violent application of a sharp instrument from without. There was no direct evidence of extraordinary exertion suddenly displayed. When last observed before the first hemorrhage the deceased was working in the manner habitual to his employment. The fact remains, however, that an extraordinary and unforeseen thing suddenly and unpremeditatedly occurred, and presence of all the essential attributes of accident cannot be gainsaid. There was ample evidence in the record to justify the finding of the Industrial Commission that the deceased came to his death by accident and the circuit court therefore properly confirmed the award. * * *

ZAPPALA v. INDUSTRIAL INSURANCE COMMISSION.

Supreme Court of Washington, 1914. 82 Wash. 314, 144 P. 54, L. R. A. 1916A, 295.

MORRIS, J. Respondent suffers from a hernia and, claiming to have received it under circumstances entitling him to relief under the Workmen's Compensation Act (Laws 1911, p. 345), filed his claim with the Industrial Insurance Commission. The claim was rejected upon the ground that the hernia complained of was not the result of "some fortuitous event" within the language of the act. Respondent then appealed to the lower court where, over the objection of the Commission, the

case was submitted to a jury to determine whether or not the injury was such as fell within the act. Verdict was returned for respondent, and the Commission appeals.

The determinative question arises under section 3 of the act, providing that: "The words 'injury' or 'injured,' as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease."

The respondent was in the employ of a cooperage company, and on the day of the alleged injury was pushing a heavily loaded truck. The language of the respondent in describing the circumstances under which the injury was received was:

"That the car ran harder than usual, and he tried three or four times to start it but could not move it. Then he put all his strength into it, gave a jerk and hurt himself; felt a sudden pain; could not move for a little while; put his hands where he felt the hurt and called for help; looked at himself and saw a swelling, a small lump where he was hurt; that he had never had any pain there before or any previous rupture."

There was other corroborative evidence. It is the contention of the Commission that these circumstances do not disclose that the injury resulted from "a fortuitous event," and that no accident occurred which produced the injury, contending that, inasmuch as respondent did not slip or fall, nothing struck him, and nothing happened out of the ordinary which produced the rupture or hernia, it cannot be said that the hernia resulted from some fortuitous event. "Fortuitous" is defined as: "Occurring by chance as opposed to design; coming or taking place without any cause; accidental; casual;" and a fortuitous cause is said to be, "A contingent or accidental cause." Standard Dictionary.

In construing the language of the act we must have in mind the evident purpose and intent of the act to provide compensation for workmen injured in hazardous undertakings, reaching "every injury sustained by a workman engaged in any such industry, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received" (State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L. R. A. [N. S.] 466), and that the act should be liberally interpreted, to the end that the purpose of the Legislature in suppressing the mischief and advancing the remedy be promoted even to the inclusion of cases within the reason although outside the letter of the statute, and that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employés regardless of the cause of the injury. Peet v. Mills, 76 Wash. 437, 136 P. 685. The sustaining of an injury while using extreme muscular effort in pushing a heavily loaded truck is as much within the meaning of a fortuitous event as though the injury were the result of a fall or the breaking of the truck.

To hold with the Commission that if a machine breaks, any resulting injury to a workman is within the act, but if the man breaks, any resulting injury is not within the act, is too refined to come within the policy of the act as announced by the Legislature in its adoption and the

language of the court in its interpretation. The machine and the man are within the same class as producing causes, and any injury resulting from the sudden giving way of the one, while used as a part of any industry within the act, is as much within the contemplation of the act as the other. When the appellant admits that the breaking of the truck because of the application of unusual force with resultant injury to the workman is covered by the act, then it must admit that the tearing of muscles or the rupture of fibers, or whatever it is that causes hernia, while exercising unusual effort, is likewise covered by the act; for there can be no sound distinction between external and internal causes arising from the same act and producing the same result. In Boardman v. Whitworth, 3 W. C. C. 33, a case arising out of the British Workmen's Compensation Act, it was held that an internal injury caused to a person in a normal state of health was a fortuitous and unforeseen event, in a case where a workman while lifting a heavy beam suddenly tore several fibers of the muscles of his back. In Purse v. Hayward, 1 B. W. C. C. 216, it was likewise held that a workman in his master's field, who, finding that the grain had been trodden down by bullocks, stooped to raise it and sprained his left leg, was within the remedies of the same act. The language of the British act is "personal injury by accident arising out of and in the course of employment."

* * * The rules adopted by the Commission governing hernia cases are: (1) There must be an accident resulting in hernia; (2) the hernia must have appeared just following the accident; (3) there must have been present pain at the time; (4) the applicant must show that he did not have hernia before the accident; (5) hernia coming on while a man is following his usual work is not an accident. We see no difficulty in sustaining a recovery under these rules, the evidence in our judgment meeting every requirement here made. The evidence takes the case out of the fifth rule, showing, as we have held, that the hernia in this case resulted from a fortuitous event or accident, and is not one appearing while the workman was following his usual work, without accident or fortuitous event to which the result might be directly traceable. * * *

The judgment is sustained.

SECTION 5.—THE INJURY MUST ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT

The fourth condition precedent to the right of an injured employee to recover compensation from his employer under the provisions of the workmen's compensation statutes is that the injury must arise out of and in the course of the employment. For an injury to arise "out of" the employment there must be some causal relation between the employment and the injury; and while it is not necessary that the injury

be one which ought to have been foreseen or expected, it must be one which, after the event, may be seen to have had its origin in the nature of the employment. For an injury to arise "in the course of" the employment, it must occur within the period of the employment, where the employee may reasonably be, and while he is reasonably fulfilling the duties of the employment, or is engaged in something incidental to it.

The words "arising out of" and "in the course of" the employment, found in all of the Compensation Acts, are used conjunctively; and in order to satisfy the statute, both conditions must occur.

It is vital to determine in each case whether or not an injury may be said to have arisen out of and in the course of the employment. The extensive interpretation which the courts have given this phrase was not for the purpose of splitting hairs as to the precise meaning of the words used. The basic reason and purpose of the scheme of compensation law is to place upon the industry the burden of loss sustained therein; to make the employer accountable for injuries sustained by employees directly due to the industry itself. It is not the purpose to make the employer the insurer of his employees at all times, but only as to those injuries with which the particular industry logically may be charged; in other words, only such as arise out of and in the course of the employment.

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1. Scope of Employment in General

In re REITHEL.

Appeal of EMPLOYERS' LIABILITY ASSUR. CORPORATION, Limited.

Supreme Judicial Court of Massachusetts, 1915. 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304.

Rugg, C. J. The deceased employé, Erhardt Reithel, was employed as superintendent of a woolen mill. It was a part of his duty to order from the premises of the subscriber any person or persons who entered without permission. During his employment he had directed a considerable number of such people to leave the mill. One Bombard entered the premises of the subscriber without permission in June, 1914, interviewed and annoyed an employé named Mrs. King, and created a disturbance. Reithel as superintendent ordered him to leave, and he did as directed. This occurrence was reported to the manager of the mill who instructed Reithel, if Bombard again appeared on the premises to order him out, and if he did not go, to send for the police authorities. The finding of the Industrial Accident Board proceeds as follows:

"Bombard appeared again on July 9, 1914, having a revolver in his possession, and engaged Mrs. King in conversation. He finally threatened Mrs. King with the revolver and she sent another employé, Provost, to the superintendent with a request that Bombard be ordered from the premises. In this connection, the evidence shows that a daughter of the superintending employé also informed him that Bombard had a revolver and was going to shoot Mrs. King. 'For God's sake, go and tend to that man,' she urged. The superintendent thereupon walked towards Bombard, made a motion towards the door, directing him to go out. Bombard immediately discharged the revolver at the superintendent, fatally injuring him, and afterwards shot at the employé's daughter and Mrs. King."

This finding presents a case of wholly unprovoked murder. The question is, whether this personal injury was one "arising out of and in the course of" the employment of Reithel. Plainly it arose in the course of his employment. It came upon him while he was doing his duty in the place and manner required by his contract of hire.

The only point of difficulty is whether it also arose out of the employment. The Industrial Accident Board has found that it did. The facts are not in dispute. The question to be decided is whether as matter of law this finding was erroneous.

The employé was the superintendent of a mill. It was a part of his general duty to order trespassers from the premises. In this respect he was required to deal with those more or less heedless of the rights of others in their conduct. Superimposed upon this general obligation resting on him by reason of his contract of employment was a special one respecting Bombard. It came into existence because Bombard on some occasion within a few weeks before the event in question had been upon the premises of the employer. He had come as a trespasser, he had annoyed a woman employé, and he had created a disturbance. It thus had appeared that he was a disorderly person. His conduct on that occasion was of sufficient importance to form the subject of a report by the superintendent to his superior, the manager of the factory. In view of these circumstances, the employé was given a special direction respecting Bombard. His duty was defined in this particular. He was to be ordered out, and the police were to be summoned if he did not go.

Commonly such precautions are not taken nor such directions given respecting the ordinary trespasser. They indicate that the employer and employé realized that they were dealing with a maker of trouble who was or might be generally lawless in his conduct, and who must be treated accordingly for the security of property and the safety of employés and others who might be upon the premises. The liability to whatever personal injury might be likely to arise in dealing with such a person was, therefore, within the contemplation of the employer and employé in establishing the boundaries of the latter's duty. That became a risk of the employment. It is not usual for people with whom a mill superintendent comes in contract to commit crime. Conduct of that sort is not to be presumed nor commonly expected. Danger of

being assaulted is not the usual concomitant of work. But when a special duty arises to deal with one who is a trespasser, an annoyer of a woman employé and a creator of disturbance, then a corresponding special risk of personal violence arises. That duty and that risk then become correlative.

It hardly can be said as matter of law, under these circumstances, that danger of assault from such a creator of disturbance as Bombard was not incidental to the doing of that which Reithel's contract of employment required of him. An element inherent in the performance of the duty of excluding trespassers from property and mischief-makers from the company of employés, is that there may be some degree of violence encountered. Those required to deal with lawless persons may be treated with lawlessness. The precise form which that risk may take is not of consequence. Its unexpectedness and gravity is not the test. Sponatski's Case, 220 Mass. 526, 108 N. E. 466. That murder resulted, instead of a broken bone, is of slight, if, indeed, it is of any, significance. This injury was one to which the employé was exposed by reason of his employment, and, but for the special duty imposed on him respecting Bombard, he would not have been in the way of receiving it. The causative danger was peculiar to his work. It was incidental to the character of the employment and not independent of the relation of master and servant. Although unforeseen and the consequence of what on this record appears to have been a crime of the highest magnitude, yet now, after the event, it appears to have had its origin in a hazard connected with the employment and to have flowed from that source as a rational consequence. Tried by the test suggested in McNicol's Case, 215 Mass. 497, 499, 102 N. E. 697, the injury seems to have arisen in the course of the employment. * * *

Decree affirmed.

GEORGE S. MEPHAM & CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1919. 289 Ill. 484, 124 N. E. 540.

THOMPSON, J. * * * Defendant in error conducted a paint factory in East St. Louis, Illinois. Deceased operated two paint mixers, known in the trade as "chasers." The two chasers operated by deceased were on the south side of the room. * * * On the north side of the room, at the east end, opposite the C-D chaser, was another paint mixer, called a "dry chaser." It was driven by a belt running from the same main shaft. * * * The belt running from the line shaft to the dry mixer broke. It was repaired by the millwright, and the foreman, Jacob Tipton, called August Roberts, the workman who had charge of the dry mixer, and another workman, Chauncey Tipton, to assist him in putting the belt back on the pulley. The foreman stood upon a platform above the heads of these two workmen so that he could handle the belt on the line shaft. When they got the belt on the pulley it was found that there was a half turn in the belt, and the fore-

man directed Roberts to get a piece of gas pipe and throw the belt off. Roberts got the pipe, and he and Tipton put it against the belt above their heads and tried to push the belt off but did not succeed. At this instant the deceased, walking from his A-B chaser toward his C-D chaser, approached these men and saw that they were having difficulty in getting the belt off. He walked up to Roberts and took the pipe out of his hand, saying, "Give me that pipe and I will show you how to get that belt off." As soon as the foreman saw what he was about he shouted to him, "Don't do that!" but deceased had gone too far. The belt jerked the pipe into the pulley and deceased was raised off his feet and thrown to the floor. His skull was crushed. * * *

In the instant case deceased was neither required nor expected to assist in adjusting this belt. The foreman had called two men to help and it is apparent no more were needed. It was merely a question of time until the belt would have been adjusted. There was no emergency. The condition of that belt did not affect the part of the work which deceased was employed to do. Deceased here volunteered his services, and before his foreman could command him not to perform the service he had placed himself in such a position that he could not save himself from the injury. * * *

As it appears from the testimony of the fellow employees of deceased that deceased was volunteering his services and was of his own volition intermeddling with something entirely outside the work for which he was employed, the judgment of the circuit court must be and is affirmed.

Judgment [quashing the award of the Industrial Commission] affirmed.

WEIS PAPER MILL CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1920. 293 Ill. 284, 127 N. E. 732.

[Deceased was employed in loading wagons of straw at a stack to be hauled to a mill near by. Frequently it was necessary to wait until a space was cleared in the mill to receive the straw. In such an interval, the day being very warm, the deceased and two other workmen lay down on a switch track in the shade of a box car. A switch engine came on the track twice a day. While deceased lay on the track, the box car was backed up by an engine and he was killed.]

CARTER, J. * * * This court has said that to recover for an accident under the Workmen's Compensation Act [Laws 1913, p. 335] it must result from a risk reasonably incidental to the employment; that an accident arises in the course of the employment if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing; that an accident arises out of the employment when it is something the risk of which might have been contemplated, by a reasonable person when entering the employment, as incidental to it. A risk is incidental to the employment

when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. It may be incidental to the employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected therewith. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764. * * *

Where a ship's engineer in an intensely cold place rigged up a temporary stove to warm his cabin, though he was told during the daytime by his superior officer that it was dangerous and warned not to use it at night, it was held that it was reasonably necessary to have his cabin heated at night, and the engineer having been asphyxiated at night it was held the accident arose out of the employment. Edmunds v. Owners of Steamship Peterson, 5 B. W. C. C. 157.

Where an employee, after having worked outside in wintry weather for several hours, came into a building and while awaiting an opportunity to use a freight elevator to carry up beef for his employer sat down in front of the fire box of the boiler and fell asleep and a few minutes after was awakened by finding his greasy clothing on fire, it was held that upon these facts the arbitrator or commissioner properly found that the injury arose out of the employment. Richards v. Indianapolis Abattoir Co., 92 Conn. 274, 102 A. 604.

In a plant manufacturing iron briquettes the injured employee was engaged in dumping cars loaded with briquettes as they came out of the plant—one car about every fifteen minutes—and had intervals of rest between unloading them. A car loaded with warm briquettes came out of the plant and he blocked it and sat or lay down on the track to get warm from the heat of the briquettes, the night being very cold, and while lying there or while picking up the briquettes in a recumbent position after getting warm he was caught and injured by the next loaded car. It was held that he was entitled to recover. Northwestern Iron Co. v. Industrial Com., 160 Wis. 633, 152 N. W. 416.

An employee working during the night shift ate his supper, for the sake of warmth, while seated on a tank in the pump room. His employers had provided a dining room for the workmen, but they were not bound to take their meals there. In getting off the tank this employee fell through an aperture in the tank and was scalded, receiving injuries from which he died. It was held that the accident did not arise out of the employment. Brice v. Lloyd, 2 B. W. C. C. 26. * * *

A city employee doing teaming for the city with his own horses and cart, during the noon hour of the day on which he had been hauling coal from a pile near a railroad sat down to eat his lunch on the railroad track when another car struck the car against which he was leaning, causing it to "kick." It was held he was not injured in the course of his employment and could not recover from the city under the Compensation act; that he incurred "a danger of his own choosing and one altogether outside of any reasonable exercicse of his employment." Haggard's Case, 234 Mass. 330, 125 N. E. 565.

To recover on the ground that an accident arose out of the employment, under the authorities it must be held that what the employee was

doing was reasonably incident to the employment. He must not unnecessarily increase the risk of injury to himself, and so the risk of liability of his master, beyond that contemplated in his contract of employment. He may not choose an unnecessarily dangerous place for the doing of such things, nor may he do them in an unnecessarily dangerous way. 25 Harvard Law Review, 411, and cases cited. It would hardly be considered as a reasonable incident of the employment that an employee, in the interval of rest between the loading of two wagons, would lie down on the switch track, in the shade of a box car, and run the risk of going to sleep, when the track was known to be used by switch engines during the day; and it does not materially affect this conclusion that at the time Klosing lay down on the tracks, and before he went to sleep, two of his fellow employees were near him, though we conclude from the record that they had left before the car was backed. This case differs in its facts materially from that of Northwestern Iron Co. v. Industrial Com., supra, where the duties of the injured employee required him to be working continuously in and around the tracks and the cars by which he was injured. Here the employee's duties did not so require. He could have rested, if he desired, during the interval between the loading of the wagons in the shade of the strawstack or in the shed where some of his clothes were, but he chose, for his own convenience, an unreasonably dangerous place, thus exposing himself to a wholly unnecessary risk. We cannot hold that there would be a reasonable implication in the contract of employment that this employee might rest in such a dangerous place during the interval between his periods of actual work in loading wagons.

The judgment of the circuit court will therefore be reversed.

Judgment reversed.

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2. Injuries Off the Premises of the Employer

MUELLER CONST. CO. v. INDUSTRIAL BOARD OF ILLINOIS et al.

Supreme Court of Illinois. 1918. 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918F, 891, Ann. Cas. 1918E, 808.

[Writ of error to the circuit court of Cook county to review a judgment affirming an award under the Workmen's Compensation Act [Laws 1913, p. 335], for injuries received by a foreman in charge of repairs upon a cathedral by being struck by an automobile when crossing the street on his way from the cathedral to a near-by saloon for the purpose of telephoning to a lumber company for materials needed that day. The foreman had personally and by his men used this telephone on previous occasions in connection with the work of repairs, and his employer had allowed the telephone charges as items in the expense account. The foreman was paid by the hour, beginning at 8 in the morning, but he customarily reached the cathedral before 8 to make preparations

for the day's work. On the day of the accident he reached the cathedral at about 7:30 and the accident happened before 8.]

CRAIG, J. * * * The statute makes the employer liable for all accidental injuries sustained, "arising out of and in the course of the employment." The words "arising out of" and the words "in the course of" are used conjunctively. In order to satisfy the statute both conditions must concur. It is not sufficient that the accident occur in the course of the employment, but the causative danger must also arise out of it. The words "arising out of" refer to the origin or cause of the accident and are description of its character, while the words "in the course of" refer to the time, place and circumstances under which the accident takes place. Fitzgerald v. Clarke & Sons, 1 B. W. C. C. 197; Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764. By the use of these words it was not the intention of the Legislature to make the employer an insurer against all accidental injuries which might happen to an employee while in the course of the employment, but only for such injuries arising from or growing out of the risks peculiar to the nature of the work in the scope of the workman's employment or incidental to such employment, and accidents in which it is possible to trace the injury to some risk or hazard to which the employee is exposed in a special degree by reason of such employment. Risks to which all persons similarly situated are equally exposed and not traceable in some special degree to the particular employment are excluded. * * *

The question is, then: Did the circumstances of the employment of the defendant in error require him to incur some special risk in using the street in the way he did? If so, no matter how slight, it cannot be said that no greater danger was imposed upon him than upon an ordinary member of the public. Under the decisions, if the plaintiff in error had employed a messenger to run errands for the foreman in charge of the work on the cathedral, to answer telephone calls and send messages by telephone, there could be no question but that he could recover if he were injured in the same manner that the defendant in error was injured. * * *

While it is undoubtedly true that the danger or liability of injury would have been greater if the nature of the employment of defendant in error had required him to cross the street several times a day, such liability would be one of degree, only. If, as a part of his duties, he was required to cross the public street for the purpose of telephoning on the business of his employer and while so doing was struck by a passing vehicle, we are unable to see why under the facts of this case, such an accident does not arise out of his employment as well as in the course of his employment. He was injured in performing a regular duty that was expected of him. It can be readily inferred from the evidence that it was part of his duties to supervise the delivery of material to the building, and that in so doing it was necessary to be on the adjacent streets to direct where such material should be deposited or brought on the premises. Had the accident occurred while he was so engaged, it would have been substantially the same, in legal effect. * * *

Judgment affirmed.

HILLS v. BLAIR.

Supreme Court of Michigan, 1914. 182 Mich. 20, 148 N. W. 243.

STEERE, J. This is an appeal by respondents, as receivers of the Pere Marquette Railroad Company, from an award of compensation made by the Michigan Industrial Accident Board for the accidental death of Irwin Hills, at Williamston, Mich., on November 16, 1912, while he was an employé of said railway, as a section hand. The facts in the case as testified to by witnesses are practically undisputed. The controversy is over inferences which may be drawn from the facts proven, and conclusions of law thereon.

On the day in question Hills was working during the forenoon at his regular employment in a section crew along respondent's railway track east of Williamston. The crew returned to Williamston with their hand car and stopped for dinner at the hand car house by the south side of the track shortly after 11 o'clock, standard time, putting the car inside preparatory to taking their meal. As they were returning, the smoke of a train coming from the east was seen in the distance. It was customary for the men to carry their dinners with them and eat together at or near where they were at work; but on this day deceased had not waited in the morning for his dinner to be put up by his wife, and hurried away to his work, saying that if he could get excused he would be home to dinner. After the men had put the hand car into the car house and the others were proceeding to eat their noonday meal, Hills took his coat and told the foreman that he was going home for his dinner, to which the foreman assented, and he hurried away. Just as he left the car house, the foreman, when reaching for his dinner pail, noticed a freight train coming from the east "about four or five pole lengths from the car house," meaning the distance between telegraph poles, and told Hills to look out for it. Answering that he would be all right, Hills hurried down the railway track in a westerly direction towards the station.

The car house at which the section men ate their dinner was located 1,934 feet east of the station, while Hill's home was about half a block north of it; 225 feet west of the car house a street crossed the railway tracks intersecting a wagon road which ran east and west, parallel with the railroad and just to the north of it. One of the section hands saw Hills go west on the track as far as the street crossing. He could have left the railroad at that point by the public street and gone home along the wagon road on the same side of the railroad as his home. This road, however, though open to the public, was not in good condition for travel. The men employed in the yards were accustomed to enter and leave at the station, going to the car house and elsewhere along the tracks as they found it most convenient. There was also a footpath along the railroad right of way between the main track and a side track, upon which they could walk in safety. The freight train, which the foreman had noticed and warned Hills of, was coming from the east on the main track of the railway and passed through the village of Williamston without stopping. It was the custom of such trains when approaching Wil-

liamston to shut off steam and slow down to from 8 to 12 miles an hour until they could catch the signal, when, if a stop was not indicated, they would increase their speed and proceed without stopping. No stop signal was set for this train on the day in question, and it passed through the yards between the car house and the depot at an estimated speed of from 15 to 18 miles an hour.

The conductor and fireman of the train testified that before catching the signal the train slowed down to 10 or 12 miles. A witness named Whipple, who was loading a car with hay at some sheds located 12 or 15 rods west of the hand car house, testified that as the train was approaching he saw a fellow coming from the west on a run pulling on his coat, and noticed him stop on the north side of the track and look to the east; from his actions witness thought he was a brakeman waiting for the train, and that the train stopped, but "they hit up quite a clip just as soon as the engine got by there"; that this was about 50 rods from the place where the man was killed by the switch. Being asked if the man he then saw was deceased, he replied: "It was a man with a fur cap on, and when I see who was lying on the ground it looked just like the coat he was putting on and the cap he had on, and that is all I know about it."

A short time after the train had passed, the body of Hills was found lying beside the main track approximately 950 feet west of the hand car house and about 1,000 feet east of the depot near a stub switch, a lantern prong of which was bent to the west. There were no eyewitnesses to the accident. The manner in which it occurred was a matter of inference from surrounding facts and circumstances proven.

It was the theory in behalf of claimant that deceased was accidently struck by the train as he was traveling along the track towards his home and thrown against the switch standard which stood about 20 feet east of where his body was discovered. Respondents contended that shortly after leaving the car house, and near the highway crossing, deceased boarded the train, which was moving slowest at that point, intending to ride as far as the depot near his home and drop off, but that as the train increased its speed on approaching the depot, after ascertaining that there was no signal set for a stop, he either jumped or fell, stricking the switch standard, and was thereby killed.

The Industrial Accident Board apparently adopted claimant's theory that deceased walked, or ran, along the railway ahead of the oncoming train for a distance of 930 feet from where he left his fellow workmen at the car house, before the train overtook him at the switch, when, as he started to pass by the light standard on the south near the track, he "walked a little too close to the car and was struck by the train and thrown against the light standard; the force of the impact hurling his body about 20 feet to the west." The board found as a fact that deceased, on his way from the car house to his home for dinner, "was accidentally struck by said train while he was traveling towards the depot and was thrown against the switch standard mentioned in the evidence, causing death." As a conclusion of law it found that he "was still his master's servant while so in the act of leaving his employment, and

that the employment covers not only the time during which the workman is engaged in his ordinary labor, but also a later time during which he is passing from the surroundings of his employment into surroundings unrelated thereto." Also holding "that deceased was killed by an accident arising out of and in the course of his employment."

Under the provision of this act, only that employé is entitled to compensation who "receives personal injuries arising out of and in the course of his employment." It is to be borne in mind that the act does not provide insurance for the employed workman to compensate any other kind of accident or injury which may befall him. The language of the Michigan compensation law is adopted from the English and Scotch acts on the same subject, and, in harmony with their interpretations, has been construed by this court, in Rayner v. Sligh Furniture Co., 146 N. W. 665, as meaning that the words "out of" refer to the origin, or cause of the accident, and the words "in the course of" to the time, place, and circumstances under which it occurred. * * *

It is well settled that the burden rests upon the one claiming compensation to show by competent testimony, direct or circumstantial, not only the fact of an injury, but that it occurred in connection with the alleged employment, and both arose out of and in the course of the service at which the injured party was employed.

While occasional exceptions are noted, as in the case of most rules, it is laid down by the authorities as a general rule that accidents which befall an employé while going to or from his work are not to be regarded as in the course or arising out of his employment. Boyd on Workmen's Compensation, § 186; Harper on Workmen's Compensation, § 34; Bradbury on Workmen's Compensation, vol. 1, p. 404.

This inquiry, therefore, narrows down to whether this is an exception to the general rule. As deceased was doing no work * * * that it is an exception rests mainly upon the claim that when killed he was yet on the premises of his employer, going from, and in the vicinity of, his place of employment. No question is involved of exceptions by the terms of hiring, of the employé being required to work overtime, or of any interruption, unusual kind of work being done, or other special circumstance in connection with the employment. The only unusual and special thing shown in that connection is the fact that at the noon hour, contrary to previous usage and custom, he left his place of employment and fellow workmen to go elsewhere on a mission of his own, not connected with his employer's business, but to please himself; the occasion being that he had failed to bring with him his dinner as was customary with the crew and as he had always done before. Can it be said that he was then engaged in his employer's business, discharging any duty or on any errand connected with his employment?

In applying the general rule that the period of going to and returning from work is not covered by the act, it is held that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it nor when he ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment. One of the tests sometimes applied is whether the

workman is still on the premises of his employer. This, while often a helpful consideration, is by no means conclusive. A workman might be on the premises of another than his employer, or in a public place, and yet be so close to the scene of his labors, within its zone, environments, and hazards, as to be in effect at the place and under the protection of the act, while, on the other hand, as in case of a railway stretching endless miles across the country, he might be on the premises of his employer and yet far removed from where his contract of labor called him. The protection of the law does not extend, except by special contract, beyond the locality, or vicinity, of the place of labor. * * *

It is shown here that deceased left the locality and sphere of his employment at a time when work was suspended, that he was doing nothing within the scope of his employment, was not under the direction or control of his employer, and went away for purposes of his own, going where and as he pleased. Though he was traveling on his employer's premises when injured, he was then 950 feet away from where any duty in the line of his employment called him, and had selected his own route. But a short distance from where he left the car house he could have turned by a public street onto a wagon road along which he could have gone to his home, and a safe footpath was also available to him along the right of way. The custom of employés to travel along the railroad in going to and from their work, when it is shown that there was another and safe way which they might have taken, is not of controlling importance. At the same distance deceased was injured, from the place of employment, they would be at most but mere licensees. In Caton v. Summerlee & M. I. & S. Co., 39 Scotch L. R. 762, it was held that the injury did not arise out of and in the course of the employment of a laborer who, at the conclusion of his day's work, was knocked down and killed by a passing engine 230 yards from where he had been working, while walking home along a private railway track belonging to his employer, which many of the men employed at the same place were in the habit of using in going to and from their work. The court there said: "The deceased at the time of the accident had ceased his work, had left the place where he did it, and was on his way home. He had at the time no duty to fulfill to his master, and his master had no duty to fulfill towards him. The relation of master and servant had ended for the day, he having fulfilled his work and left the place where his work was being done."

Under the undisputed testimony in this case, and accepting the findings of fact made by the board as conclusive, claimant has failed to show such relations of cause and effect between the accident and the duties of the party injured to his employer as will support a conclusion of law that the injury arose out of and in the course of the employment.

The decision, or award, herein is therefore reversed and set aside.[4]

[4] The concurring opinion of McAlvay, C. J., is omitted.

3. Violation of Rules by Employee

H. W. NELSON R. CONST. CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1919. 286 Ill. 632, 122 N. E. 113.

[McGhan was employed in construction work on a single track railroad bridge over the Rock river. His work was on the ground at the end of the bridge. The bridge was without footpath and in frequent use by trains. Other workmen, employed on the bridge itself, went to and from their work across the bridge. McGhan, against previous orders, attempted to cross the bridge at the noon hour to get his dinner pail which he had left on the other side of the river. He was struck by a train, which there was not room to avoid, and knocked into the river. The circuit court set aside a compensation award.]

Duncan, C. J. * * * The general rule announced in both English and American decisions is that going to lunch by an employee is an incident of his employment; that the dinner hour, although not paid for by the employer, is included in the time of employment; that a temporary absence from the place of employment for the purpose of procuring food does not suspend the employment; that an injury occurring during such a temporary absence arises out of and in the course of such employment; and that it makes no difference that the injury occurred off the premises of the employer if the employee was using premises which he had a right to use and which provided the only available way to reach the point to which he was going for lunch. In re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, and foot-note thereto in which a large number of authorities are collated.

* * * This general rule does not apply where an employee chooses to go to a dangerous place where his employment does not necessarily carry him and where he incurs a danger of his own choosing and one altogether outside any reasonable exercise of his employment. Northern Illinois Light & Traction Co. v. Industrial Board, 279 Ill. 565, 117 N. E. 95. * * *

Inasmuch as an injury occurring during the noon hour only arises out of and in the course of the employment when the employee is using a way which he had a right to use and which was the only available way, or as safe as any other available way, to reach the place he was to eat his lunch, it was incumbent on the administratrix to establish those facts by competent evidence. The record is silent upon that question and simply does not show whether or not there was such an available way other than the crossing of the railroad bridge. * * *

As it appears from the record that the deceased was violating an instruction of his employer, given by the superintendent in charge of the work, when the accident occurred, the injury cannot be said to have arisen out of and in the course of the employment. Dietzen Co. v. In-

dustrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; Northern Illinois Light & Traction Co. v. Industrial Board, supra.

The judgment of the circuit court is affirmed.

Judgment affirmed.

SCOTT v. PAYNE BROS., Inc.

Supreme Court of New Jersey, 1914. 85 N. J. Law, 446, 89 A. 927.

Under the Workmen's Compensation Act of 1911 (P. L. p. 134), the petitioner was employed for an indefinite period at $5 per day to work on a contract for the erection of a structural steel building. He had been working a week when the injury happened. "Scott with two others were pulling on a hand chain connected with a block for the purpose of operating a mechanism which caused a lifting chain to pass through the block and lift a steel girder. In some way, the lifting chain became clogged, probably by the turning or twisting of one of the links, and by being forced through the block it split the block, and Scott, who was sitting with his face within a few inches of the side of the steel block, was struck on the forehead and received a laceration." The statement is quoted from defendant's brief.

SWAYZE, J. This was not a case of casual employment. The petitioner was employed in the regular business of the defendant, and likely to be retained for some time, and as long as the work remained unfinished. It was not a mere temporary, accidental employment.

The injury was due to an accident arising out of and in the course of his employment. That employment was as a structural steel worker upon the building in course of erection; the lifting of the steel girder was a necessary part of the work; the defendant was liable to be called on, as he was, to assist. The suggestion to the contrary is that the men who were pulling continued to do so, although the foreman told them to stop; and the argument is that this disobedience of orders involves the conclusion that what followed was not in the course of the employment. Scott says he did not hear the order to stop, and the judge so found. The case therefore does not involve an accident happening to a petitioner by reason of his own disobedience. We see no reason to doubt that a disobedience of orders by his fellow workmen is as much one of the risks of the employment as a defect in the appliances. The accident, whether due to one cause or the other, was one of the risks which might have been contemplated by a reasonable person as incidental to the employment; it occurred while Scott was doing what he might reasonably do at that time and place. Bryant v. Fissell, 86 A. 458. We cannot accede to the suggestion of the defendant that disobedience of a specific order to stop work ends the employment for the time being. The man does not cease to be an employé because at certain instants of time he is not actually engaged in work. Employment within the meaning of the statute refers rather to the contract than to the labor done in pursuance of the contract. * * *

[The award of compensation is affirmed.]

UNION COLLIERY CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1921. 298 Ill. 561, 132 N. E. 200, 23 A. L. R. 1150.

DUNCAN, J. * * * The only reasons given by defendant in error for the claim that the injury and death did not arise out of and in the course of the employment is that the deceased rode on the cage to the top for the purpose of dumping the car of coal, and that in thus riding the cage he violated paragraph (b) of section 12 of the Mining Act [Hurd's Rev. St. 1919, c. 93], which provides that no one shall ride on a cage containing either a loaded or empty car. * * * From the number of times that the deceased was proven to have ridden to the top of the tipple on the cage we think the defendant in error is chargeable with notice that it was his habit to do so, although the top foreman testified that he had not seen him ride on the cage from the ground to the top. * * *

Riding the cage to the top of the tipple for the purpose of dumping the car of coal did not have the effect of taking the deceased out of the line or scope of his employment. Had he walked up the stairway instead of riding the cage, we apprehend that no one would say that he was not actually performing his duties to defendant in error. Performing the act by the former method would have been the safer way, and had he not performed it in the more dangerous way the claim made by the defendant in error that he would not have been injured and killed must be accepted as true. Conceding that he violated section 12 of the Mining Act, the most that can be said is that in so doing he was guilty of negligence. Alexander v. Industrial Board, 281 Ill. 201, 117 N. E. 1040. We held in the case just cited that the violation of a city ordinance was prima facie evidence of contributory negligence, and that such violation did not bar the recovery of compensation although it resulted in the employee's death. We also held in that case, and have held in a number of other cases, that contributory negligence is not a bar to recovery under the Compensation Act. Decatur Railway Co. v. Industrial Board, 276 Ill. 472, 114 N. E. 915. * * *

Defendant in error contends that the prohibition of the statute against riding the cage with a car on it ought to have the same effect as an order or rule of the employer against riding the cage. If this be conceded we cannot concur in defendant in error's conclusion that such order or rule would bar a recovery of compensation by plaintiffs in error. If in violating such rule or order the employee does not put himself out of the sphere of his employment, so that it may be said he is not acting in the course of it, he is only guilty of negligence in violating such rule and order, which does not bar recovery. Chicago Railways Co. v. Industrial Board, supra [276 Ill. 112, 114 N. E. 534]. Of course, where the violation of a rule or order takes the employee entirely out of the sphere of his employment and he is injured while violating such rule or order, then it cannot be said that the accident arose out of the employment. In Jackson v. Denton Colliery Co., W. C. & Ins. Rep. 91, 7 B. W. C. C. 92, it is said: "The sole question in this cause is

whether the man was outside the sphere of his employment. It does not matter in the slightest degree how many orders he disobeys or how bad his conduct may have been if he was still acting within the sphere of his employment and in the course of it and if the accident arose out of it." The deceased in this case was clearly acting within the sphere of his employment and in the course of it. His injury arose out of and in the course of his employment, and the plaintiffs in error have without question proven this fact. They were entitled to recover compensation.

The judgment of the circuit court must therefore be reversed and the cause remanded to that court, with directions to quash the writ. * * *

WEST SIDE COAL & MINING CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1920. 291 Ill. 301, 126 N. E. 218.

DUNCAN, J. * * * The deceased was employed by plaintiff in error at its mine as a rock and slate picker. His principal duties were to pick out the rock and slate from the coal as it passed through a chute leading from the coal mine to the railroad cars upon which it was being loaded. His location while performing that duty was on a seat at the top of the coal chute. * * * The deceased left his seat and went down and removed some of the blocks or sprags under the car so that the car might move further down the incline and fill with coal at its other end. This car was an extra wide car, and by reason thereof, while the car was moving down the incline, the deceased's head was caught between an upright or post of the coal chute and a standard of the coal car. His head was thus crushed and he died a short time thereafter.

There is no dispute about the facts. The deceased was not engaged in any part of his duty, under the evidence, at the time of the accident but was engaged in an act that he had been told not to do. It cannot be said, therefore, that his death arose out of and in the course of his employment. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; Central Garage v. Industrial Com., 286 Ill. 291, 121 N. E. 587; Rainford v. Chicago City Railway Co., 289 Ill. 427, 124 N. E. 643.

It is contended by plaintiff in error that the top foreman saw the deceased on the ground just after he had taken the blocks or sprags from under the car and that he did not then warn or tell him not to engage in that work. The car was already then moving, and while the foreman perhaps knew that deceased had removed the sprags, he was several feet away from him and it does not appear that a warning at that time would have saved the deceased.

As the deceased was not within the scope of his employment at the time of his injury the Industrial Commission had no jurisdiction to make an award for compensation. It is our duty to consider the evidence in the record which determines the question of jurisdiction. That evi-

dence clearly shows that the deceased was outside of the scope of his employment and was not engaged in any duty for which he was employed or in any work incident thereto.

The judgment of the circuit court is affirmed.

Judgment affirmed.[5]

[5] It is well settled that, where the accidental injury was occasioned by a violation of a rule or order, such violation takes the employee out of the course of his employment and constitutes a defense to a claim for compensation; but this is true only where the employer can show that the existence of the rule was known to the employees, and that it had been strictly enforced throughout, and that the injury was due to the willful disobedience of the employee in breaking the rule. In such cases the courts hold that the injury did not arise out of and in the course of the employment, but, on the contrary, that the employee had willfully gone out of the scope of his duties. Thus, where a workman engaged in picking oakum was badly burned from an explosion of the oakum, occurring when he lit his pipe in violation of the rule against smoking prominently displayed by means of a sign in the very shed where the accident occurred, it was held that the employee's violation of the rule was no defense to the employer, for the reason that the evidence showed there had been no enforcement of the rule; consequently the man's lighting the pipe was not such an act as would take him out of the scope of his employment.

In Dietzen Co. v. Industrial Commission, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764 (1917), a workman employed to polish small pieces of metal at a machine accidentally dropped one of them into an exhaust pipe, not a part of his machine, and against previous orders put his hand into the pipe to recover the piece of metal, and so brought it into contact with the exhaust fan. It was held that the injury did not arise out of the employment. Carter, J., referred to other cases as follows: "A boy who had charge of the handle of a machine lifted off the cover over some pinion wheels and played with them, with the result that his hand was caught in the wheels and the end of one of his fingers was torn off. He had orders not to lift the cover or touch the pinion wheels. It was held that the accident did not arise out of and in the course of his employment. Furniss v. Gartside & Co., 3 B. W. C. C. 411 (1910). A boy employed in a spinning mill injured himself while cleaning the machinery when it was in motion. He was not employed to clean the machinery, and it was held that the accident did not arise out of the employment. Naylor v. Musgrave Spinning Co., 4 B. W. C. C. 286 (1911). A lad fourteen years of age was employed as a bobbin boy at a spinning mill. His duty was to take off the bobbins and he had been fully instructed for the work. While the machine was in motion he attempted to put on some weights which had fallen off, and was injured. The duty of putting on weights belonged to men employed for that purpose. It was held that the master was not liable for the injuries received. Michael v. Henry, 209 Pa. 213, 58 A. 125 (1904). A boy employed in a boot factory, who was directed to take an insole downstairs to have it remolded, and in the absence of the operator of the molding machine attempted to remold it himself and was injured, was held entitled to compensation where he had not been expressly forbidden to touch the molding machine. Tobin v. Hearn, 44 Ir. L. T. 197 (1910). A woman, injured while cleaning a part of the machinery that it was not her duty to clean, was held to have suffered an injury arising out of and in the course of the employment, where she was not expressly forbidden to clean the machinery. Greer v. Thompson, [1912] W. C. C. 272. Authority for a servant to act on an emergency in his master's interest, may be implied. Where a workman was injured in attempting to stop his master's runaway horse it was held that the accident arose out of and in the course of the employment although his work was wholly unconnected with the horses. Rees v. Thomas, 68 L. J. Rep. 539 (1899). A workman was employed to look after baggage, clean out lion cages and generally make himself useful, but it was not a part of his duty to feed the lions. One afternoon this workman was left in sole charge of the cages of lions, with orders to see that

4. Quarrels Between Employees

PEKIN COOPERAGE CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1918. 285 Ill. 31, 120 N. E. 530.

Dunn, J. * * * On December 26, 1916, the Pekin Cooperage Company was engaged in the cooperage business in Peoria. Rasor was engaged in picking out or culling barrel staves for another employee, who was known as a "barrel raiser," whose duty it was to make the barrels. George A. Miller was culling staves a few feet from Rasor for another barrel raiser. It was the duty of each culler to cull staves for his barrel raiser, and in case his rack ran out of staves it was customary for the culler to take staves from another culler's rack. Miller had been taken from the half-barrel department and put to culling staves in the afternoon, and had been working about half an hour when the injury happened. He had taken a half pint bottle of whisky with him to the plant in the morning, from which he had taken two or three drinks, and he had about half the whisky left. Shortly after the injury the superintendent sent Miller home, because he was drinking on the job. Miller had gone to another part of the building a few minutes, and when he returned he took some staves from Rasor's rack and put them in his own. Rasor objected to this in language which was offensive, and a fight ensued, the details of which are clouded in the obscurity which usually attends such occurrences. There is evidence tending to show, and which would justify the conclusion, that Miller was the aggressor throughout, and that Rasor did no more than defend himself. Rasor's claim is for injuries received in this encounter.

Rasor clearly suffered an accidental injury in the course of his employment. It was a sudden and unexpected mishap, occurring outside of the usual course of events, without any design on his part, while he was engaged at his work. The compensation to be provided and paid by the employer under the Workmen's Compensation Act is not, however, for all accidental injuries which may be sustained by his employees in the course of their employment but only for such as also arise out of the employment. There must be some causal relation between the employment and the injury. * * * In Armitage v. London & Western Railway Co., 86 L. T. 883 (a case under the English Workmen's Compensation Act), two boys, fellow workmen of the claimant, were "larking" and one pushed the other into a pit. The latter in anger threw a piece of iron at the former, but missed him and injured the claimant, who was engaged at his work. It was held that the

no harm came to the lions or to any one by reason of their fierceness. One of the lions got out of a cage and into a dressing room, but there was no evidence to show how it happened. The workman went into the dressing room and tried to drive the lion back into the cage, when the lion killed him. It was held that as he had been left in charge it was his duty to get the lion back into the cage, and that as he was killed in the discharge of his duty the accident arose out of and in the course of his employment. Havelman v. Poole, 2 B. W. C. C. 48 (1908)."

act had no relation to the employment, but was an intentional wrongful act, and was not a risk of the employment. In Baird v. Burley, 45 Scott, L. R. 416, the claimant, who was working in a coal mine, was pursuing a fellow workman to prevent him from carrying off a hutch. The latter threw some rubbish, and the former, in seeking to avoid it, struck his head against the side of the passage. It was held the accident was caused by the act of a fellow workman outside the scope of his employment, and that the claimant was therefore not entitled to compensation. In Murphy v. Berwick, 43 Ir. L. T. 126, a customer came out of the bar of a hotel into the kitchen, which adjoined it, and made a rush at the cook, who in trying to avoid him threw her hand through a glass door and was injured, and it was held that the accident did not arise out of her employment. In New Jersey it was held that an employee is not entitled to compensation for an injury which was the result of horseplay or skylarking, whether he instigated it or took no part in it. Hulley v. Moosbrugger, 88 N. J. Law, 161, 95 A. 1007, L. R. A. 1916C, 1203. To the same effect is Pierce v. Boyer-Van Kuran Lumber & Coal Co., 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D, 970. This is contrary to our decision in the case of Pekin Cooperage Co. v. Industrial Board, 277 Ill. 53, 115 N. E. 128. The death of a watchman in a mill, who was killed by a robber who concealed himself for the purpose of robbing the watchman and not the mill, was held not to arise out of his employment. Walther v. American Paper Co., 89 N. J. Law, 732, 99 A. 263. On the other hand, in the following cases the injuries have been held to arise out of the employment: Where a premeditated assault was made upon a schoolmaster by unruly pupils, resulting in his death. Trim Joint School District Board v. Kelly, [1914] A. C. 667. * * * Where an assault by a fellow workman on the claimant resulted from a struggle over a brush to be used in the work. McIntyre v. Rodgers & Co., 41 Scott. L. R. 107. Where a workman, whose duty it was to take care of the horses which he drove, objected to the amount of cold water which a fellow workman was throwing on the horses in washing them and was injured in a fight growing out of the quarrel. Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. Where a workman was killed while at work by an intoxicated fellow workman, whose condition and habits were known to the superintendent. In re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306. Where a worker on a railroad section was not doing his work properly, and upon his neglecting to follow the foreman's directions the latter told him to drop his shovel and get his time, but the man refused and the foreman undertook to take his shovel from him and was injured. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398. In Mueller Construction v. Industrial Board, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918F, 891, Ann. Cas. 1918E, 808, we held that an injury to an employee who was struck and injured by an automobile in going across the street from his working place in the line of his duty, for the purpose of telephoning orders in furtherance of the business of his employer, arose out of the employment.

Each of the decisions cited was rendered upon a consideration of the facts of the particular case. Two cases are seldom precisely alike in their facts. Some, at least, of the cases cited are doubtful, and with the conclusions reached in some of them we do not agree. All concur in the rule that the accident, to be within the Compensation Act must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. The origin of this difficulty was trifling—the taking of a few staves from the claimant's rack, to which he objected, saying, as he testified, that if Miller would stay in there he would be up with the claimant. The dispute was concerning the employer's work in which the men were both engaged, and there is evidence tending to show that the claimant was not responsible for the assault.

The judgment will be affirmed. * * *

CITY OF CHICAGO v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1920. 292 Ill. 406, 127 N. E. 49, 15 A. L. R. 586.

DUNN, C. J. John Gallagher, a laborer in the employ of the city of Chicago, was at work on August 3, 1917, loading sand from a freight car into wagons near the municipal pier. He got down from the car and went to a hydrant to get a can of drinking water, with which he returned to the car. A negro named Ramsey was working on an adjoining car and asked Gallagher for a drink, but Gallagher told him to get his own water. Ramsey called him a name and told him to climb on the car and he would knock his head. Gallagher said nothing, but after standing there for a few minutes climbed upon the car to go on with his work and Ramsey called him a name and struck him on the head with a shovel. Gallagher died as a result of the injury, and the Industrial Commission affirmed a decision of an arbitrator allowing compensation to his widow. * * * The felonious assault which was made upon the deceased was without any excuse. It had no more connection with the work in which he was engaged than if Ramsey had been a loiterer on the street and had asked for a drink from Gallagher's can. There was no causal relation between the work and the assault. The affair was purely personal, with no reference to the employment. Ramsey and Gallagher happened to be at the same place because of their employment, but an injury done by one to the other on account of some purely personal grudge which this proximity gave an oppor-

tunity to inflict was not a result of the employment. There was no causal connection between the conditions under which the work was to be done and the injury. The injury was not incidental to the character of the business, but the *deceased would have been equally exposed to it entirely apart from his employment.*

The judgment will be reversed and the award set aside.

Judgment reversed.

SECTION 6.—NOTICE OF THE ACCIDENT AND CLAIM FOR COMPENSATION

Nearly all of the compensation statutes provide that no suit for compensation may be maintained unless the employer has had notice of the accident within thirty days of its occurrence, and unless claim for compensation has been made to the employer within six months. The giving of this notice within the lime limit of thirty days, and the making claim for compensation within six months, of the date of the accident, are conditions precedent to any right of the employee to recover compensation.

As to notice, ordinarily there is no formal requirement of written notice; knowledge on the part of the employer that the employee has suffered an accidental injury will be sufficient to dispense with special notice oral or written. Where an agent of the employer, as, for example, the foreman or superintendent, was present and witnessed the accident, this will be sufficient to comply with the notice requirement, for notice to the agent is notice to the principal. Where the injured employee seeks medical aid from the company doctor and tells him the circumstances of his injury, here also the employer will be deemed to have knowledge, irrespective of whether the doctor reported the accident to the employer.

The purpose of the notice requirement is to prevent liability attaching for fraudulent claims without the opportunity given the employer to investigate them before such lapse of time that the fraud could not be discovered.

Claim for compensation must be made within six months of the accident. Usually there are no formal requirements for such claim; it may be verbal or written. It may be a request for compensation for disability, or for medical or hospital treatment, if the employer understands that the request is made on account of accidental injuries. Filing suit within the six months will be sufficient to constitute claim.

IDEAL FUEL CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1921. 298 Ill. 463, 131 N. E. 649.

FARMER, J. * * * Section 24 of the Workmen's Compensation Act [Hurd's Rev. St. 1919, c. 48, § 149] provides that claim for compensation shall be made within six months after the accident, or, if payments have been made under the act, * * * within six months after such payments have ceased. * * * The statute is mandatory and must be complied with to give the Industrial Commission jurisdiction. * * *

Defendant in error contends a claim * * * for compensation was made within six months. Defendant in error never returned to his employment and no payments were ever made to him. * * * The principal reliance [as to claim made] is a purported * * * letter written by the wife of defendant in error to E. W. Baker, general manager of plaintiff in error. * * * The letter of Mrs. Fox in substance referred to the many years her husband had been employed by plaintiff in error and the "misfortune coming to him in such an unexpected way," and the writer said she was obliged to appeal to the company for some consideration; that her husband had served the company to the best of his ability "until he fell on the job"; that he was in a hospital and any assistance would be appreciated. The letter concluded with the sentence, "Hoping that you will sympathetically and charitably consider my appeal." * * * That letter is the basis for the claim that demand was made. It was well calculated to appeal to the kindness and generosity of the employer to do something for an old, faithful employee in his unfortunate and distressing condition, but contains no intimation that he claimed any legal right to demand compensation. No special form for claim of compensation is required and the claim need not be in writing, but it must apprise the employer that the employee is entitled to compensation and that demand therefor will be made. It here plainly appears from the evidence that no demand for compensation was made within the time required.

The order of the circuit court affirming the award of the Industrial Commission will be reversed.

Reversed.

CHAPTER 2

AMOUNT OF COMPENSATION PAYABLE

SECTION 1.—IN GENERAL

Modern workmen's compensation legislation is the result of compromise between the conflicting interests of employer and employee. As stated in an expressive opinion:

"Both had suffered under the old [common-law] system, the employers by heavy judgments of which half was opposing lawyer's booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it. * * * To win only after litigation, to collect only after the employment of lawyers, to receive the sum only after months or years of delay, was to the comparatively indigent claimant little better than nothing. The workmen wanted a system entirely new." [6]

Under the workmen's compensation law, the employee gains an absolute right to compensation for injury, without regard to fault or negligence on the part of the employer. In effect, the employer becomes an insurer of his employees so far as injuries received in connection with the employment are concerned. On the other hand, the workman under the Compensation Act gives up his right to recover the full amount of his loss, and agrees to accept the limited amount of money prescribed by the act, often far less than he might have recovered at law. For example, for an injury resulting in death or permanent total disability, at law the workman, provided he can prove the injury due to the employer's negligence, may obtain by the jury's verdict a judgment of perhaps ten or twenty or thirty thousand dollars damages against the employer; while under the compensation law the maximum amount obtainable is in the neighborhood of five thousand dollars.

The general scheme of all workmen's compensation legislation fixes as a base the amount of compensation payable for injury not resulting in death at one-half the average earnings of the injured workman, and for injury resulting in death or total disability four times the average

[6] Stertz v. Industrial Ins. Commission, 91 Wash. 588, 158 P. 256, Ann. Cas. 1918B, 354 (1916).

annual earnings, providing a maximum and minimum amount within which the sum payable must lie. In general it may be said that the maximum is usually fixed at about $5,000, and the minimum at $1,500. It is impracticable to attempt to compare the provisions of the various acts on this subject. The statute of the state in which the injury occurred should be consulted in any specific case. However, the general scheme of Workmen's Compensation Acts is similar, and an understanding of the subject may be attained by examination of a typical statute. The Illinois act is directly modeled on the English workmen's compensation statute, and is typical of its class. What is said in this chapter concerning the amount of compensation payable is said with the above considerations in mind, and with particular reference to the Illinois act.

In making provisions for the amount of compensation that shall be paid for injuries, the statutes make two great classifications: (1) Injuries resulting in death; and (2) injuries not resulting in death. We shall consider these separately.

SECTION 2.—COMPENSATION FOR DEATH

The amount of compensation payable for an injury to an employee resulting in death is in general four times the average annual earnings of the employee, but in no case less than sixteen hundred and fifty dollars, nor more than thirty-seven hundred and fifty dollars.

If the deceased employee left a widow or children, whom he was under a legal obligation to support at the time of his death, then the compensation is payable to them. In the case of a widow and one child under the age of sixteen, the maximum is increased to four thousand one hundred dollars, and the minimum to two thousand dollars. In the case of a widow and two children, the maximum is increased to four thousand three hundred and fifty dollars, and the minimum to two thousand one hundred dollars.

If there were no widow nor children whom the deceased employee was under legal obligation to support, then if the employee left any parent, husband, child or children who were totally dependent upon his earnings, compensation amounting to four times the annual earnings of the employee, but in no case less than sixteen hundred and fifty dollars, nor more than thirty-seven hundred and fifty dollars, is payable to them.

In the event that there was less than total dependency, then there is payable such proportion of four times the average earnings as the partial dependency bears to total dependency.

If no amounts are payable as above, then the compensation is payable to collateral heirs, if any, in amounts proportional to their dependency.

If the injured employee died without any relatives whatever in any way dependent upon him, then the employer will be liable only for funeral expenses to the amount of one hundred and fifty dollars.[7]

ROCK ISLAND BRIDGE & IRON WORKS v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1919. 287 Ill. 648, 122 N. E. 830.

DUNN, J. * * * The commission found that the deceased's wages were $1,400 a year; that his mother, Mary McQuaid, was his sole beneficiary and was partially dependent upon him to the extent of fifty-six per cent. of total dependency, and was entitled to receive fifty-six per cent. of four times his annual wages, being $3,136, and made an award of that amount. * * *

The evidence tended to show that the mother's only means of support was $90 a month, which she received from her husband and her son. While her husband was under a legal duty to support her, the question whether she actually received all or a part of her support from her son and looked to him for such support is a question of fact, which upon this record is concluded by the finding of the commission that she was partially dependent upon him. There is, however, no evidence which tends to sustain the finding that her dependency was fifty-six per cent. of total dependency. The evidence is that she received $90 a month, all of which was expended in paying the expenses of the family of six persons. The dependency which justifies an award is a personal dependency for support and maintenance—an actual dependency for support consistent with the dependent's position in life. It does not include the maintenance of others whom the dependent is under no legal obligation to maintain or contributions which merely enable the donee to accumulate money. * * *

The $40 from the husband's income was at least a partial support. The additional $50 was a general benefit to the family, but there is no basis in the evidence for determining what proportion of it was used for the support of the mother and what proportion for general family expenses. There is therefore no basis for the finding that her dependency was fifty-six per cent. of total dependency. The finding of partial dependency, whatever its degree, entitled the claimant to the minimum award of $1,650.

The facts found were sufficient to constitute the basis for a proper decision, and the judgment of the circuit court is therefore reversed and the cause is remanded, with directions to enter an award for $1,650,

[7] Compensation Act Ill. 1925 (Laws 1925, p. 380), § 7.

payable in installments, if the claimant shall elect to accept such award, otherwise to remand the cause to the Industrial Commission for another hearing.

Reversed and remanded with directions.[8]

SECTION 3.—COMPENSATION FOR INJURIES NOT RESULTING IN DEATH

As above stated, the amount of compensation payable by the employer for injuries not resulting in death is one-half the average earnings; that is, an employee working for twenty dollars per week, who suffers an accidental injury arising out of and in the course of his employment, would be entitled to ten dollars per week from his employer during the period of his disability. If he have minor children to support, the portion of the weekly wage is slightly increased. It is, however, of importance to note that a maximum is set by the act beyond which the workman may not recover, no matter how large his weekly wage should be. This maximum is set usually in the Compensation Acts at $18; and an employee whose wage is $50 per week would be entitled only to the maximum, or $18 per week. Thus it will be seen that compensation legislation is designed primarily for the workman, and not for the highly paid mechanic or salaried superintendent.

Medical Bills and Temporary Disability.—Compensation Acts ordinarily place upon the employer the duty of payment of medical, surgical, and hospital bills incurred by the employee in the treatment of his injury, as well as payment to the employee of compensation at the rate of half the weekly wage during the period of his disability even where the disability is not permanent but only temporary. However, there is no liability upon the employer to pay compensation where the temporary disability is for a less period than what is called the "waiting period," usually eight days; nor where the temporary disability is less than total.

Permanent Partial Disability.—For any injury which partially incapacitates the workman from pursuing his usual line of employment, compensation is payable in amount equal to one-half the difference be-

[8] In Henry Pratt Co. v. Industrial Commission, 293 Ill. 367, 369, 127 N. E. 754 (1920), Thompson, J., said: "Partial dependency may exist, even though the evidence shows the claimant could have subsisted without the contributions of the deceased employee. It is not necessary to show that the claimant would have been without the necessities of life, nor is it necessary to show that the dependent was without other means of support. Appeal of Hotel Bond Co., 89 Conn. 143, 93 A. 245 (1915)."

tween the average amount he earned before the accident and the average amount he is able to earn after the accident. The compensation payable for permanent partial disability is thus fixed at half the loss of earning power.

Specific Loss.—All of the Compensation Acts carry a fixed schedule whereby the exact amount of compensation payable for amputation or permanent loss of use of the various members of the body is provided. This schedule fixes an evaluation of one-half the weekly wage for a period of weeks varying from sixteen weeks for the loss of the little finger to two hundred and twenty weeks for the loss of the arm. Fingers, arms, legs, feet, eyes, etc., are all separately provided for in varying numbers of weeks at half pay.

Total Permanent Disability.—In the event of complete disability, which renders the employee wholly and permanently incapable of work, compensation equal to one-half of his earnings is payable weekly until the amount so paid equals the amount payable as a death benefit; and thereafter a pension for life is payable equal to eight per cent. of the amount of the death benefit.

Disfigurement.—Where there is no permanent disability, partial or total, the employer who has paid compensation for the period of temporary total disability, and has paid the medical and hospital bills, is not subject to any further liability, except when the employee has suffered a disfigurement as a result of the accident. For pain and suffering there is no liability, but for disfigurement the workman may recover compensation up to a reasonable amount, not ordinarily in excess of five hundred dollars.

CHICAGO HOME FOR THE FRIENDLESS v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1921. 297 Ill. 286, 130 N. E. 756.

THOMPSON, J. * * * January 28, 1917, while in the employ of plaintiff in error as a laundress, Kate Budnick caught her left hand in a mangle and mashed it badly, necessitating the amputation of her fingers. She developed a state of tetanus, which involved the muscles of mastication. * * * She masticates her food with difficulty and there is a noticeable disfigurement of her face. Medical, surgical, and hospital treatment were furnished to her by plaintiff in error. Her weekly wage was $12 and she was paid full compensation throughout the period of temporary disability. The commission awarded her $6 a week for a period of 150 weeks as compensation for the loss of the left hand and $6 a week for a period of 104 weeks as compensation for a serious and permanent disfigurement of the face.

Plaintiff in error concedes its liability for the loss of the left hand and has voluntarily paid the installments arising out of that injury as

they fell due. It contends, however, that it is not liable under the Compensation Act for any disfigurement of the face of defendant in error. We have held that if an employee receives two injuries—one that disables him and another that causes disfigurement of his hands, face or head—he is entitled to compensation for the disability and the disfigurement. Wells Bros. Co. v. Industrial Com., 285 Ill. 647, 121 N. E. 256; International Coal & Mining Co. v. Industrial Com., 293 Ill. 524, 127 N. E. 703, 10 A. L. R. 1010. On the other hand, we have held that where an employee is disabled and disfigured by the same injury he is not entitled to recover compensation for the disfigurement. Smith-Lohr Coal Co. v. Industrial Com., 291 Ill. 355, 126 N. E. 164. The only question presented for decision is, therefore, whether defendant in error suffered one or two injuries. If at the time her hand was crushed in the mangle she had fallen into the machinery and disfigured her face, there would be no question but that she would be entitled to compensation for the injury to the hand and the disfigurement to the face, but the facts here present a different situation. Defendant in error suffered a single injury, which has resulted in a disability and a disfigurement. Paragraph (c) of section 8 of the Compensation Act of 1915—the one under which this proceeding is had—provides: "For any serious and permanent disfigurement to the hand, head or face, the employee shall be entitled to compensation for such disfigurement: * * * Provided, that no compensation shall be payable under this paragraph where compensation is payable under paragraphs (d), (e), or (f) of this section: And, provided, further, that when the disfigurement is to the hand, head or face as a result of an injury, for which injury compensation is not payable under paragraphs (d), (e) or (f) of this section, compensation for such disfigurement may be had under this paragraph." Laws of 1915, p. 403. Compensation was payable and has been awarded under paragraph (e) of section 8 for loss of the left hand—the only injury defendant in error received. Compensation has been paid for the temporary disability resulting from the sickness which followed this injury, and the act does not authorize further compensation for a disfigurement resulting from the same sickness. This case presents a meritorious claim for which compensation is not provided by the terms of the act, but the courts are not authorized to write a provision into the act in order to sustain this award. The remedy is with the Legislature. * * *

Reversed in part and affirmed in part.

CHAPTER 3

LIABILITY OF THIRD PARTIES TO PAY COMPENSATION

SECTION 1.—WHERE THE INJURY IS CAUSED BY THE NEGLIGENCE OF A THIRD PARTY

GONES v. FISHER.

Supreme Court of Illinois, 1919. 286 Ill. 606, 122 N. E. 95, 19 A. L. R. 760.

[Action at law for damages from defendant's negligence in running an automobile against plaintiff. Defense to the effect that plaintiff was subject to the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i), that his injury arose out of and in the course of his employment and was not caused by the negligence of his employers or of their employees, that he had accepted from his employers $1,000 as compensation, and that this action was not maintained by his employers. The question involved in this case was whether an employee, under the Workmen's Compensation Act, who has suffered an injury through the negligence of a third person not connected with the employment, may recover in an action at law against the third person.

Section 6 of the act provides that no right to damages other than the right under the Compensation Act shall be available in respect to injury sustained by an employee subject to the act while engaged in the line of his duty. Section 29, however, provides in substance that, where an injury for which compensation is payable under the act was not caused by the negligence of the employer or of his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer, then, if such other person is bound by the act, the right to enforce the liability shall be transferred to the employer, who may enforce it up to the amount of compensation payable, but, if such other person has elected not to be bound by the act, he shall remain fully liable, but the employer shall be entitled to receive from the damages when paid, an amount equal to the compensation paid or to be paid, or if the employment has paid or agreed to pay compensation, or proceedings for an award have been begun, the employer himself may bring or continue action against such other person, but must pay to the injured employee or his representatives anything collected in excess of compensation and expenses.]

DUNCAN, C. J. * * * In those two cases [Keeran v. Peoria, etc., Co., 277 Ill. 413, 115 N. E. 636 and Friebel v. Chicago, etc., Co., 280 Ill. 76, 117 N. E. 467] the employer, the employee and the third party whose negligence was alleged to have caused injury to the employee were all under the Compensation Act. It was held in those cases

that the Compensation Act fixed the utmost measure of liability to the employee and that the employer was the only party directly liable to the employee, and that the employee could maintain no action whatever in his own name against the party causing his injury. It was further held that the common-law right of the employee to sue for his injury against the party negligently causing his injury was in such a case transferred to his employer, and that the employer could maintain a suit against the party causing the injury by proving such common law right against such negligent party, but that the amount of such recovery could not exceed the amount that the employer was required to pay his employee under the Compensation Act. In the Friebel Case it was further held that the statute permitted the employer to sue the negligent party for such damages, where all three of them were under the Compensation Act, as soon as the amount of the compensation for the employee was determined and fixed. * * *

By the express provisions of section 29 above quoted, where the person by whose neglect the injury is caused has elected not to be bound by the act, as alleged in three of the pleas now under consideration, the common-law right of action is preserved against him in full. In such case the employee is not put to his election between compensation under the Compensation Act and damages at common law. The common law action and the claim for statutory compensation may be prosecuted at the same time. Said section does not limit the damages which may be recovered in the action at law to the amount of compensation allowed to the employee, but does provide for the indemnification of the employer out of the amount recovered. After the employer is thus completely indemnified the employee is entitled to the entire balance of the judgment recovered, if there is a recovery for more than is sufficient for such indemnification. * * *

It must necessarily follow [therefore that both employer and employee have an immediate interest in such a suit, and] that either the employee or the employer may prosecute such a suit to a final judgment and force the collection of the same. * * * [We conclude, then, that plaintiff employee may maintain this suit at law, even though he is under the Workmen's Compensation Act, and that appellant's objection was properly overruled.]

Reversed and remanded, with directions.[9]

9 Where employer and employee are under the Compensation Act, and the employee is injured while in the course of his employment by reason of the negligence of a third party, if the third party also is operating under the provisions of the Compensation Act, the total measure of damages will be the amount of compensation provided by the act. The employer must pay to the employee the compensation provided for, but the employer is at once subrogated to the rights of the employee against the third party whose negligence caused the injury; the important point to observe is that by reason of the fact that the third party is under the act his liability is limited to the sum therein granted.

SECTION 2.—LIABILITY OF OWNER, CONTRACTOR, AND SUBCONTRACTOR TO PAY COMPENSATION

1. Liability of the Subcontractor

The liability of the subcontractor to pay compensation to his employees injured in the course of their employment is of course direct, and by virtue of the provisions of the Compensation Act. As to his employees, the subcontractor stands in the relation of employer; and the provisions of the act impose liability upon him without any alternative. Since practically all Compensation Acts expressly declare as hazardous all construction, excavation, electrical work, and the erection, maintenance, removal, remodeling, altering, or demolishing of any structure, almost every conceivable detail of the building trades is brought under the compensation law automatically and without election, and it is safe to assume that any principal contractor or subcontractor in any state which has a compensation statute is subject to the Act.

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2. Liability of the Contractor and Owner

As to his own employees, the contractor or the owner will be liable to pay compensation for injuries received in the employment, according to the terms of the act. There is no direct liability on the owner or contractor to pay compensation to employees of the subcontractor, but many of the compensation statutes contain clauses which impose liability upon the owner and contractor, where the subcontractor has failed to insure his liability in some insurance company authorized under the laws of the state in which he is operating. Such provision, where the condition of insurance has not been complied with by the subcontractor, places a duty on the principal contractor to pay compensation to the workmen in the employ of the subcontractor as well as to his own employees. And as to the owner, where neither principal contractor nor subcontractor is insured, he may be forced to pay compensation to the subcontractor's employees, the contractor's employees, and to the men who work directly for him.

BUTLER ST. FOUNDRY & IRON CO. v. INDUSTRIAL BOARD OF ILLINOIS et al.

Supreme Court of Illinois, 1917. 277 Ill. 70, 115 N. E. 122.

COOKE, J. This is a writ of error to review a judgment, entered by the circuit court of Cook county, confirming and approving a decision of the Industrial Board awarding compensation to the widow and administratrix of Frank Willman, Jr., deceased, against the Butler Street Foundry & Iron Company, plaintiff in error.

John Martin was a subcontractor under plaintiff in error in the erection of structural iron work on a building in the city of Chicago. The deceased was in the employ of Martin, and on October 14, 1915, sustained an injury in the course of his employment which resulted in his death. At the time of the injury to the deceased Martin had not insured his liability under the Workmen's Compensation Act. The widow, who is also administratrix of the estate of the deceased, filed a petition with the Industrial Board to be awarded compensation against Martin and the plaintiff in error. The board of arbitration awarded her $3,500, payable in weekly installments of $11.54, $50 expended in first aid treatment, and $183.33 for medical, surgical, and hospital services, to be recovered against Martin and plaintiff in error. On petition for a review the Industrial Board approved the award. This decision was, in turn, approved by the circuit court of Cook county upon a writ of certiorari.

It was disclosed from the proof made that on different occasions plaintiff in error had directed Martin to take out insurance for the protection of his employés, and Martin had represented to it that such insurance would be carried. On October 13, 1915, the day before the deceased was injured, Martin secured $200 from plaintiff in error, which he represented was for the purpose of providing for such insurance. This money was used by Martin for the purpose of paying off his men, and no part of the sum was used to take out insurance. Plaintiff in error contends that in insisting and demanding that Martin insure his liability to pay compensation under the Workmen's Compensation Act, and in advancing money to him for that purpose, it had required of him that he insure his liability to pay compensation, as was its duty under section 31 of the Workmen's Compensation Act. Said section 31 is, in part, as follows:

"Any person, firm or corporation, who undertakes to do or contracts with others to do, or have done for him, them or it, any work enumerated as extrahazardous in paragraph (b) section 3, requiring employment of employés in, on or about the premises where he, they or it as principal or principals, contract to do such work or any part thereof, and does not require of the person, firm or corporation undertaking to do such work for said principal or principals, that such person, firm or corporation undertaking to do such work shall insure his, their or its liability to pay the compensation provided in this act to his, their or its employés, * * * shall be included in the term 'employer' and with

the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act."

It is the contention of the plaintiff in error that the word "require," as used in this section, is synonymous with the word "demand," and that plaintiff in error did all the act required of it when it demanded and insisted repeatedly that Martin take out insurance, and when it advanced him the money with which to pay for the insurance. While it is undisputed that Martin represented to plaintiff in error, when he secured the $200 on October 13th, that he desired it for this purpose, it appears that the money was due him under his contract, and was not advanced as the money of the plaintiff in error. The word "require," as used in this section, is not used in the sense contended for by plaintiff in error. By this section it becomes the duty of the principal contractor to see to it that his subcontractor insures his liability to pay the compensation provided by the act or become liable himself to pay such compensation. Under the statute the principal contractor is made primarily liable for all injuries received by the employés of his subcontractor, and he can only escape this liability by requiring his subcontractor to insure his liability as provided by section 31. Knowing that he is thus liable unless he takes this precaution, the principal contractor must either see to it that the subcontractor insures his liability or stand ready to pay any compensation that may be awarded on account of an injury to an employé of the subcontractor. By making it a part of his contract with the subcontractor, the principal contractor can require him to take out this insurance as easily and effectively as he can require him to perform any other provision of the contract between them. The statute contemplates an absolute requirement on the part of the principal contractor, and it is not complied with by a mere demand. The principal contractor can escape liability only in case his subcontractor insures his liability as is provided by this section.

It is further contended that under the provisions of paragraph (a) of section 8 of the act the limit of the liability of an employer for necessary first aid, medical, surgical, and hospital services is $200, and that the circuit court erred in confirming the award of the Industrial Board for an amount in excess of $200 for such services. Paragraph (a) of section 8 of the act is as follows:

"The employer shall provide necessary first aid, medical, surgical and hospital services; also medical, surgical and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of $200. The employé may elect to secure his own physician, surgeon or hospital services at his own expense."

We are of the opinion that under a proper construction of this paragraph of section 8 the contention of the plaintiff in error is correct, and that the total amount which can be awarded for first aid, medical, surgical, and hospital services is the sum of $200. The award of $233.33 for such services was in excess of the limitation prescribed in the statute, and should have been approved and confirmed only in the sum of $200.

The judgment of the circuit court is reversed, and the cause is remanded for such further proceedings as are consistent with the views herein expressed. The costs in this court will be assessed one-third to defendant in error and two-thirds to plaintiff in error.

Reversed and remanded.

DAVIS v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1921. 297 Ill. 29, 130 N. E. 333, 15 A. L. R. 732.

[Davis was engaged in the hardware business. He also owned an apartment house, in which he rented out apartments for income. Davis contracted with Greenough for Greenough to clean the outside walls of the apartment house. Employees of Greenough, while cleaning the walls, fell from a scaffold. Greenough was insolvent and had not insured against liability under the act. The employees obtained an award for compensation against Davis, which the circuit court affirmed. Error.

[Section 28 of the act provides that, if an employer carries liability insurance, the insurer as well as the employer shall be liable to an employee. Section 31 provides that (with the exception of work done on a farm, or country place, etc.) a person engaging in a business or enterprise of erecting, maintaining, removing, altering or demolishing any structure, or of construction, excavating or electrical work (every such business being declared to be extrahazardous) who has the work done by a contractor or subcontractor, shall be liable to make compensation for injury to the employees of the contractor or subcontractor unless the contractor or subcontractor has insured against liability.]

FARMER, J. * * * It is also contended by plaintiff in error that he is not liable under section 31 of the Workmen's Compensation Act [Hurd's Rev. St. 1919, c. 48, § 152d]. His argument is he was engaged in the business of a hardware and paint merchant, and while he owned the building in question and some others which he maintained and rented for income, he was not engaged in the business of maintaining the building and the business in which he was engaged was not embraced in the Workmen's Compensation Act. * * * We do not understand that it is required by the Workmen's Compensation Act that one shall be exclusively engaged in one of the hazardous occupations enumerated to make him liable to compensation. This court has held that a man may engage in two kinds of business, one not extrahazardous or within the Workmen's Compensation Act unless the party so elects, and the other may be within the act without election because it is extrahazardous. Vaughan's Seed Store v. Simonini, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713. The work being done at the time the accident happened was done in maintaining the building. It was, in fact, dangerous and extrahazardous.

Judgment affirmed.

MECHANICS' LIENS

CHAPTER 1

NATURE OF LIEN

Liens in General.—A lien is a form of security for the payment of a debt. It consists of a right in one man, the creditor, to detain that which is in his possession belonging to another, the debtor, until the debt is paid.

In liens upon personal property, this right consists of possession. For example, a railroad, having carried goods, has a lien upon those goods for the freight, which is to say that the railroad has the right to retain possession of the goods and refuse to give them up to the owner until the freight is paid. So, also, an innkeeper has a lien upon a guest's personal effects; a warehouseman has a lien upon goods stored; a pawnbroker has a lien upon goods pledged. Since a lien upon personal property consists of a right of possession, if the creditor loses possession, he loses his lien.

In liens upon real property, the right given the lienholder is not that of possession, but rather a right in the value of the land. The debtor landowner sells or retains his land subject to the lien. The land itself is charged with payment of the debt. A real estate mortgage is an example of this kind of lien.

Enforcement of Liens.—The enforcement of all liens, whether on real or personal property, is in the main the same, although the procedure is different. In each case the lien is enforced by compelling a public sale of the property, and the creditor lienholder's debt is paid to him out of the proceeds, any balance remaining being returned to the debtor property owner.

Mechanics' Liens.—Most of the liens referred to above were recognized by the common law. Mechanics' liens, on the other hand, are entirely a creature of statute, depending for existence, extent, enforcement, etc., upon the language of the legislative enactment. Most of the mechanics' lien statutes of the various states are similar in general outline, but differ in many cases as to detail. It is therefore necessary to consult the statute of any particular jurisdiction to determine whether the local lien law differs from the provisions contained in most of the mechanics' lien acts. For an understanding of the general theory

and application of mechanics' liens, however, we may examine the provisions of a typical statute and the interpretation given it by the courts.

"Any person who shall by * * * contract, express or implied, * * * furnish material, fixtures, apparatus, machinery, or forms, for the purpose of building, altering, repairing, or ornamenting any * * * building, walk, driveway, fence, or improvement, * * * or fill, sod, or excavate such land, or do landscape work thereon; or raise or lower any house thereon; or perform services as architect or structural engineer; or furnish or perform labor or services as superintendent, timekeeper, mechanic, or laborer in the building, altering, or repairing of the same, shall have a lien upon the whole of such lot or tract of land * * * for the amount due to him for such material, fixtures, machinery, services or labor. * * *"

Definition of Mechanic's Lien.—A mechanic's lien is a right created by law to secure priority of payment of the price or value of work performed and materials furnished in the improvement of land, and this right attaches to the land and the buildings erected thereon. Under most of the lien statutes, any person who expends services or materials on another's land is entitled to a lien therein for the price. And this means that the land itself is chargeable with the payment; that it may be sold to satisfy the lienholder's claim.

CHAPTER 2

PERSONS ENTITLED TO LIEN

The mechanic's lien statutes generally point out the classes of persons who may acquire liens. The term "person" has been construed to include corporations, partnerships, municipalities, and in general all bodies capable of contracting. Persons entitled to lien are of three distinct classes: Contractors, subcontractors, and sub-subcontractors.

Contractors.—Any person who furnishes services or material to the owner, or the owner's agent, directly, is termed a contractor. The construction company, which contracts with the owner of land to build a building thereon, is a contractor. The lumber dealer, who sells directly to the owner of land lumber to be used in the erection of a building, is a contractor.

Subcontractors.—The subcontractor is the person who furnishes services or material to the person who contracts with the owner. The lumber dealer, who sells material for a building to the construction company which has contracted with the owner of the land to build the

building, is a subcontractor. The plumber, who has contracted with the construction company to install the plumbing in the building, is a subcontractor. The subcontractor is one to whom a portion or all of the contract is sublet.

Sub-subcontractors.—The sub-subcontractor is the person who furnishes services or materials for a building to the person to whom the contractor has sublet a portion or all of the contract. For example, suppose an owner employs A to erect his home for a certain price. A in such case is the contractor, within the meaning of the lien law. A employs B, a cement contractor, to put in the foundation for a certain price. B is then the subcontractor. B contracts with C to furnish the cement. C is the sub-subcontractor.

Materialmen.—A materialman is one who furnishes material for a building by contract with the owner, contractor, or subcontractor. He is himself a contractor, subcontractor, or sub-subcontractor, within the meaning of the lien law, according to whether he dealt with the owner, contractor, or subcontractor. In any case, he is entitled to a lien for all material delivered for incorporation into the building.

Mechanics and Laborers.—The statutes of the various states generally provide for liens for work done on improvements by mechanics and laborers. The mechanic or laborer is usually either a subcontractor or a sub-subcontractor according to whether he was employed by the contractor or the subcontractor.

Architects, Structural Engineers, Superintendents.—As to architects and structural engineers, although many statutes specifically give them a lien, certain questions frequently arise as to their lien rights, particularly where the projected building was in fact never built. Where the statute in a particular jurisdiction does not mention architects, the problem arises as to whether they may claim a lien under the clause, "Any person who has performed labor," etc.

FRIEDLANDER v. TAINTOR.

Supreme Court of North Dakota, 1905. 14 N. D. 393, 104 N. W. 527, 116 Am. St. Rep. 697, 9 Ann. Cas. 96.

YOUNG, J. The plaintiff brought this action to foreclose a mechanic's lien upon a certain two-story store and office building situated in the city of Park River. The findings and judgment of the trial court were in plaintiff's favor. The defendant has appealed from the judgment, and assigns error upon the judgment roll proper.

The trial court found, among other things, that the plaintiff furnished plans and specifications for, and superintended the construction of, said building, pursuant to a contract with the defendant, under

the terms of which the plaintiff was to be paid for his services 3 per cent. of the cost of the building. The appeal presents but a single question. The plaintiff is an architect, and the lien involved in this case is for his services in drawing plans and specifications and supervising the construction of the building upon which the lien is claimed. The defendant contends that such service will not support a lien under our statute. This contention cannot be sustained. Section 4788, Rev. Codes 1899, declares that "any person who shall perform any labor upon * * * any building or other structure upon land * * * under a contract with the owner of such land * * * shall * * * have for his labor done * * * a lien upon such building." The statute does not designate the persons who are entitled to liens under it by name or occupation. Its language is general. "Any person" who otherwise comes within its provisions is entitled to a lien. It includes all persons who perform "any labor upon any * * * building."

It is urged that the services of an architect in drawing plans and specifications and supervising the construction cannot be said to be labor upon the building. This question is not a new one to the courts, and it has been held with great unanimity that where the architect not only draws the plans, but superintends the construction, he is entitled to a lien; and this under statutes which merely give a lien in general terms for work and labor furnished in the erection of a building. * * * The Alabama statute uses the same language, and the court, in Hughes v. Torgerson, supra [96 Ala. 346, 11 So. 209, 16 L. R. A. 600, 38 Am. St. Rep. 105], sustained the lien of a supervising architect. "Are such services by an architect 'work or labor upon * * * a building or improvement on land,' within the meaning of the statute? Code, § 3018. It is plain that a contractor for the construction of the building is within the protection of the statute. If he was also intrusted with the planning of the building, and with the sole supervision of its erection, we think it equally plain that his services in these particulars could be regarded as properly a part of his work 'upon the building,' and that compensation therefor might be included in the amount for the security of which he could acquire a lien under the statute. Under a New York statute a lien was authorized in favor of 'any person who shall perform any labor or furnish any materials in building, altering, or repairing any house,' etc., 'by virtue of any contract with the owner,' etc. 'This language,' it was said in Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262, 'is general and comprehensive, and its natural and plain import includes all persons who perform labor in the construction or reparation of a building, irrespective of the grade of their employment or the particular kind of service. The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls; and labor of a most important character.'" * * *

There is a sharp conflict in judicial opinion as to whether an architect who merely furnishes plans and specifications is entitled to a lien. Upon this we express no opinion. The plaintiff's contract in this case included the supervision of the construction, and under the rule of con-

struction adopted by the great majority of the courts under the same or similar statutes to which we give our adherence he was entitled to the lien.

Judgment affirmed. All concur.

FOSTER & LIBBIE v. TIERNEY et al.

Supreme Court of Iowa, 1894. 91 Iowa, 253, 59 N. W. 56, 51 Am. St. Rep. 343.

The following is appellants' statement, in argument, of the facts set out in the petition: "The plaintiffs were architects in the city of Des Moines. One J. F. Tierney, the owner of the realty described in the petition, employed them, at an agreed percentage of the cost of certain improvements, to plan, devise, and construct plans and specifications for the remodeling and rebuilding of the building then standing upon the realty. By virtue of this employment, they were necessarily compelled to go, and did go, upon the premises, and into the buildings and improvements then standing, and measured the walls thereof, and dug into the earth about the foundation, and examined the walls and foundations, and spent much time and labor in and upon the said buildings and improvements. Upon the said measurements and examinations they devised and constructed, upon the said premises and in their office, plans and specifications for the erection and completion of the improvements then situate upon the said realty, and the owner accepted such plans and specifications. The plaintiffs duly filed their statement for a mechanic's lien in Polk county, where the land is situated. The defendants purchased the property of J. F. Tierney with full knowledge of the existence of the claim of plaintiffs, and that they had not been paid for their labor. The plaintiffs brought suit in due time to foreclose their lien, and the defendants demurred to the petition, which was sustained. The plaintiffs appeal." Affirmed.

GRANGER, C. J. A ground of the demurrer is that it appears that the contemplated improvements were not made, nor were the plans and specifications used; and the legal proposition is presented whether or not, under such circumstances, a mechanic's lien would attach. By section 3, c. 100, Acts 16th Gen. Assem., it is provided: "Every mechanic or other person who shall do any labor upon * * * any building, erection or other improvement upon land * * * shall have for his labor done or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated." It is important to observe for what a lien is granted. It is for labor upon a building, erection, or improvement upon land. It is not granted merely for labor upon land. It is not contended that anything more was done, in this case, than the preparation of the plans and specifications, which involved some labor in and about the building and premises. The work done was only to get information necessary to prepare plans for contemplated improvements or changes. We have no hesitancy in saying that the measure-

ments and work done about the building give to the plaintiffs no greater right to a lien than would the preparation of the plans and specifications without such work and measurements, if designed for the same premises. It is then a question whether or not an architect who prepares plans and specifications for a building that is not erected, or an improvement that is not made, has a lien therefor.

Take the case of a building for which such plans are made, and it is not erected, and there is nothing to which the lien can attach but the naked land. Can it be said that work has been done upon the building? The law contemplates that the lien is to attach to the building and the land upon which it is situated. Reading the entire law of the state on the subject of mechanics' liens, and it is nowhere found expressed, nor does it seem to leave to legitimate inference, a right to such a lien for work, unless it has been done upon, or in aid of, a building or improvement that such work has aided in producing. We are cited by appellants to a number of authorities in support of their claim, but all of them seem to be in harmony with our view; that is, in all the cases cited, where a lien is held to attach, there is something done in the way of a building or improvement to give rise to the lien. In Indiana, where the lien attaches to the building, it is held that the foundation of a barn constituted a building, within the meaning of the statute. Scott v. Goldinghorst, 123 Ind. 268, 24 N. E. 333. See, also, Charnley v. Honig, 74 Wis. 163, 42 N. W. 220; Kelly v. Rowane, 33 Mo. App. 440. In the case of Knight v. Norris, 13 Minn. 473 (Gil. 438), the building was nearly completed, and then abandoned, and the claim of the architect for plans and specifications and superintending the work of construction was adjudged a lien on the premises. We are without any authority in support of the lien claimed in this case, and we do not think that it should be held to exist. The judgment of the district court is in harmony with this conclusion, and it is affirmed.[1]

[1] In Illinois, a distinction is made between architects who draw plans for a building only, and those who superintend its erection, and the latter, who more positively perform work "in or about the building," are held to be entitled to a lien.

In Louisiana and Minnesota, the architect is held to be entitled to a lien, even if he does not superintend, provided the building is actually built.

In Missouri, Kentucky, and Maine, an architect is not entitled to a lien, even if he superintends the building. This is the minority rule.

CHAPTER 3

FOR WHAT LIEN MAY BE OBTAINED

SECTION 1.—IN GENERAL

The modern mechanic's lien statutes now cover nearly every conceivable improvement which has become a part of and enhances the value of the premises. Every builder who constructs, repairs, alters, ornaments, raises, or lowers any building, from a skyscraper to a woodshed, may obtain a lien on the property to secure the payment of the contract price. Every mechanic, laborer, superintendent, engineer, etc., who contributes his services to the construction, may file a lien against the property for the payment of his wages, salary, or fee, as the case may be. Every materialman who has furnished materials, fixtures, apparatus, or machinery for incorporation into a specified improvement may obtain a lien therein for the contract price.

SECTION 2.—LABOR AND SERVICES LIENABLE

Certain questions have arisen as to the lienability of the cost of labor and services performed upon articles which are designed to go into the construction of a building, but which were never so incorporated. As we have already seen, there is no lien for an architect's fee for plans and specifications contracted for a building which in fact was never built. A somewhat similar question arises as to other forms of labor and services, and as to materials delivered for incorporation into a particular improvement but actually not so included. These questions are considered in the cases following.

BERGER v. TURNBLAD et al.

Supreme Court of Minnesota, 1906. 98 Minn. 163, 107 N. W. 543, 116 Am. St. Rep. 353.

START, C. J. This is an appeal from a judgment of the district court of the county of Hennepin in favor of the plaintiff decreeing a lien to the extent of $680.05 upon the premises of the defendant Turnblad, hereafter designated as the defendant. The only question pre-

sented by the record for our decision is whether the facts found by the trial court entitled the plaintiff to a mechanic's lien in any sum in excess of $148.50. Such facts, so far as here material, are substantially these: The defendant was engaged in building a house upon his lots. He entered into an agreement with a contractor doing business by the name of Frank W. Berger & Co., to provide all materials and perform all the labor for the plain and ornamental plastering in the house. In carrying out his agreement, the contractor employed his son, the plaintiff, to do certain of the work on the ornamental plastering for the house at the agreed price of 55 cents for each hour of work. Pursuant to such employment the plaintiff worked for the contractor 1,421 hours, his work ending June 17, 1905. He was paid therefor only the sum of $101.50, leaving a balance of $680.05 due from the contractor to him for his work. The contractor actually constructed and placed in the house ornamental plastering to an extent and value not to exceed $250, upon which the plaintiff worked 221 hours.

The balance of the work done by the plaintiff was at the shop of the contractor, where he was employed in making designs, models, and casts intended exclusively for and adapted to the construction of the ornamental plastering work in the house. This product of his work was of no value or use for any other purpose than that for which it was intended. It was necessary that such designs, models, and casts should be made preliminary and as the first steps in the work of constructing the ornamental plastering in the house pursuant to the contract. The defendant and the contractor for convenience adopted the shop as the place for doing such preliminary work, instead of the premises where the house was being erected, which was there supervised by the defendant's architect. Shortly after the plaintiff had completed such work at the shop the defendant and the contractor had a controversy as to their respective rights and duties under their contract. Thereupon the contractor, without any justifiable cause, refused to proceed with his contract, and although requested by the defendant so to do he refused to deliver such designs, models, and casts, or any of them, to the defendant, or to permit them to be used in the placing of the ornamental plastering in the house, and no part thereof was ever actually delivered upon the lots of the defendant, or in fact ever became a part of the house.

Do these facts justify the conclusions of law upon which the judgment is based, that the plaintiff performed labor and furnished skill for the erection of the house within the meaning of the statute? The statute then in force (Gen. St. 1894, § 6229) reads as follows: "Whoever performs labor or furnishes skill * * * for the erection of * * * any house or other building * * * by authority of the contract with, or at the instance of the owner thereof or * * * his contractor or subcontractor, shall have a lien to secure the contract price or value of the same upon such house and upon the right, title and interest of the owner thereof."

The defendant claims that through no fault of his but by reason of the wrong of the contractor he was deprived of all benefit of the plain-

tiff's labor except to the extent of $250, and that other than this the plaintiff has not performed labor or furnished skill in the erection of the house, and having been paid $101.50 thereon, he is entitled to a lien for only the balance $148.50. It is clear that if the failure to place the product of the work of the plaintiff in the house had been that of the defendant and not of the contractor, the plaintiff would be entitled to a lien for the full value of his labor. If such were this case it would be ruled by the case of Howes v. Reliance Wire Co., 46 Minn. 44, 48 N. W. 448. It was held in the case cited that, where material required by the contract for the construction of a building was prepared at the yard or shop of the contractor with the express or implied consent of the owner of the building, but was never actually placed in the building by reason of the fault of the owner thereof such work of preparation and manufacture must be deemed to have been furnished for the construction of the building, and that the contractor was entitled to a lien therefor. The converse of this proposition is necessarily true, and if the failure to place the materials in the building is due to the fault of the contractor he is not entitled to a lien.

In this case, however, while the product of the plaintiff's labor, although made expressly for the building, at the shop of the contractor with the defendant's consent and under his supervision by his architect, yet it never actually went into his house or upon his premises by reason of the wrongful act of his contractor. Can the wrong of the contractor in this case be imputed to the plaintiff? If the plaintiff's work had been done on the premises or the product thereof had been delivered thereon to be used in the erection of the house, and the contractor had wrongfully taken it away and diverted it to other purposes his wrong could not be imputed to the plaintiff and his right to a lien would be unaffected by the contractor's wrong. Burns v. Sewell, 48 Minn. 425, 51 N. W. 224. In the last case cited the owner of a lot made a contract with a builder to erect a house thereon. The contractor purchased material to be used in the erection of the house from a third party who delivered it upon the lot, but the contractor removed it from the lot, and never placed it in the building so that the owner of the lot never received any benefit from the material. It was held that the materialman was entitled to a lien on the lot of the owner notwithstanding that by the wrong of the contractor in diverting the material the innocent owner of the lot never received any benefit from the material. The basis of this holding was succinctly stated by Mr. Chief Justice Gilfillan in these words: "Cases may, of course, occur where a dishonest contractor may divert to other purposes material sold and delivered for the purpose of constructing a building. But ordinarily, in such a case, the one who accredits the contractor and enables him to purchase on the credit of the building and land should suffer, rather than the innocent seller of the material."

The necessary inference from the two decisions we have cited is that mechanics and materialmen furnishing labor or materials for the erection of a building, at the request of the contractor, are given by the statute not simply the right to be subrogated to the rights of the con-

tractor, but an independent right to a lien on the building and land upon which it stands, which cannot be defeated by the misconduct or fraud of the contractor. The owner when he enters into a contract with a builder for the erection of a house is deemed to contract with reference to the statute which becomes a part of the contract and in legal effect he thereby consents that his contractor may, subject to the conditions and limitations of the statute, pledge the credit of the building for the necessary labor and materials for its construction in accordance with the contract. Laird v. Moonan, 32 Minn. 358, 20 N. W. 354; Bohn v. McCarthy, 29 Minn. 23, 11 N. W. 127; Bardwell v. Mann, 46 Minn. 285, 48 N. W. 1120. It is true as a general rule that to entitle a mechanic or materialman to a lien for work performed or materials furnished at the request of the contractor, the work must be done, or the material delivered on the premises upon which the building is being erected.

The case of Howes v. Reliance Wire Co., supra, however, establishes an exception to this rule which is to the effect that where the material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises. The exception ought not to be extended to cases not fairly within the principle upon which it rests, otherwise the door will be opened for fraud or collusion between the contractor and the mechanic or materialman. The finding of the trial court in this case brings it clearly within the exception for the work of the plaintiff was, by the consent of the defendant, performed at the shop and it was there passed upon by the defendant, by his architect, as the work progressed. The defendant and the contractor adopted the shop as the place for doing the work which was necessary to be done in the erection of his house. The plaintiff's right to a lien then is exactly what it would have been if he had performed the labor in the preparation of the materials for the erection of the house on the premises upon which it was being built, and the contractor had refused to permit the product of his work to be placed in the house. It follows that the fact that the work was done at the shop and not on the premises does not affect the plaintiff's right to a lien.

This leaves only the question whether the wrongful act of the contractor is to be imputed to the plaintiff whereby his right to a lien will be defeated. Upon principle it logically follows, from what we have said as to the basis of a mechanic's or materialman's right to a lien, that his right cannot be impaired by any misconduct of the contractor to which he is not a party. Upon authority it necessarily follows from the decision of this court in the case of Burns v. Sewell, supra, that the right of an innocent mechanic or materialman to a lien cannot be impaired by the wrong or fraud of the contractor in which he in no manner participates. We therefore hold upon the particular facts of this case that the plaintiff was entitled to a lien for the full value of his work.

Judgment affirmed.

SECTION 3.—MATERIALS LIENABLE

1. Temporary Materials

The question as to whether there is a lien for materials used in construction, but not incorporated into the building, is one on which there is much conflict of authority. Some of the mechanic's lien statutes expressly create a lien for lumber used for forms or form-work for concrete construction; but even in such jurisdictions by judicial interpretation, as indicated in one of the cases following, it would seem that delivery for the purpose of being used in the construction of the building is a necessary element. Where the material is used up or destroyed in the process of making or taking down the forms, it is difficult to see why there should not be a lien.

MORITZ v. LEWIS CONST. CO. et al.

Supreme Court of Wisconsin, 1914. 158 Wis. 49, 146 N. W. 1120, 51 L. R. A. (N. S.) 1040.

This action was brought to foreclose a mechanic's lien. The respondent Sands Lumber Company furnished certain lumber to the contractor, who was engaged in building a reinforced concrete building on the land of appellants. The lumber was used for what is known in the trade as shoring; that is wooden forms are constructed, into which the concrete is poured, and in which it remains until it has set, when the shoring is removed. The shoring is often used several times in constructing the same building. The case was sent to a referee, who made his report and findings, and his findings were substantially adopted by the court on the facts material here. The question involved is whether the Sands Lumber Company was entitled to a lien for the shoring furnished, or any part thereof. * * *

Kerwin, J. (after stating the facts as above). It is contended by appellant that the Sands Lumber Company acquired no lien for any of the lumber used in shoring, because it did not become a part of the structure, and, further, that the findings to the effect that 75 per cent. of the lumber was consumed in the construction of the building, and that 25 per cent. was depreciated in value, as specified in the findings, are not supported by the evidence. A careful examination of the evidence convinces that the findings are well supported by the evidence. The question whether the Sands Lumber Company was entitled to a lien upon the established facts is a more delicate question. In a case recently decided by this court (Barker & Stewart L. Co. v. Marathon P. M. Co., 146 Wis. 12, 130 N. W. 866, 36 L. R. A. [N. S.] 875), it was held that where lumber was furnished and used in a cofferdam, which dam was no part of the building, but was afterwards torn or blown out and the lumber thereby became destroyed or practically so,

the materialman furnishing the lumber was entitled to a lien upon the structure, though no part of the lumber became a part of it. It appeared that the cofferdam was a structure built in order to facilitate the construction of a concrete dam on the premises to furnish water power to operate the mill in process of construction on the premises. The cofferdam was a temporary affair, and became useless after construction of the permanent or concrete dam.

While the right to a mechanic's lien must be found in the statute, this court has held that the statute must be liberally construed, with a view of carrying out its intention and remedial purpose. The statute gives a lien for materials furnished "for or in or about" the erection of the structure, and the question here is whether the shoring used in the reinforced concrete building were furnished for, in, or about the building. There is no question here but what the material was furnished and delivered to be used in the building, and was in fact used for shoring, but did not remain in the building after the concrete had become set, and 25 per cent. of it was removed and used for other purposes, though considerably depreciated in value by use in appellant's building. Seventy-five per cent., as the court found, was practically consumed or destroyed by use.

This case is very similar in principle to Barker & Stewart L. Co. v. Marathon P. M. Co., 146 Wis. 12, 130 N. W. 866, 36 L. R. A. (N. S.) 875. There the lumber did not remain in the structure, but was practically destroyed in the use. Here the lumber was actually used in the construction by supporting the concrete until it hardened and was self-supporting, and then was removed. It was thus used several times in the construction, and after the building was finished had become so damaged that 75 per cent. of it was practically destroyed and of no value, except for kindling wood, as the evidence shows and the court found.

It has been held that mechanics' liens may be allowed for the value of explosives used in preparing the ground for the building of the structure, upon the principle that where the material is used directly upon the structure instrumental in producing the final result and actually consumed in use, it may be said to form a part of the structure. See cases cited in Barker & Stewart L. Co. v. Marathon P. M. Co., 146 Wis. at page 22, 130 N. W. 866, 36 L. R. A. (N. S.) 875. The logic of these decisions is, as said by this court in the Barker Case, that the material is consumed necessarily in the process of constructing the building, and that its life has gone into the fabric of the structure. This necessarily is peculiarly applicable to the instant case. The shoring had physical contact with the building in its construction. It added to the value of the completed structure, and its life and substance had in effect gone into the structure to the extent, at least, that the material was consumed. We think it clear, therefore, that the Sands Lumber Company, furnisher of the material, had a lien for the 75 per cent. of the lumber consumed.

Nor do we see any solid reason for denying a lien for the amount of depreciation of the remaining 25 per cent. of the lumber used for

shoring. This lumber was likewise used in the construction of the building, but in such use was not wholly consumed, but was consumed or destroyed to the extent found by the court below, and for which amount of destruction or consumption a lien was awarded. Thus, the whole amount of consumption of the lumber used in the construction of the building was held lienable. This ruling is, we think, in harmony with Barker & Stewart L. Co. v. Marathon P. M. Co., supra, and late cases in other jurisdictions. * * *

In Avery & Sons et al. v. Woodruff & Cahill et al., supra [144 Ky. 227, 137 S. W. 1088, 36 L. R. A. (N. S.) 866], it was held that the materialman had a lien for lumber furnished for shoring in construction of concrete building where the lumber was in greater part consumed in the building; and the case of United States F. & G. Co. v. Probst, 97 S. W. 405, 30 Ky. Law Rep. 63, is distinguished. Darlington L. Co. v. Westlake C. Co., 161 Mo. App. 723, 141 S. W. 931, holds that where the material is consumed in whole or in part the claim is lienable. This was a case of lien for shoring used in the construction of a concrete building.

True, there are cases holding that no lien exists for lumber used to make molds for concrete work; as, for example, Rittenhouse v. Brown, 254 Ill. 549, 98 N. E. 971. But it will be seen the lumber was not destroyed or consumed in that case, but was taken away and used again. In the case of Kennedy v. Commonwealth, 182 Mass. 480, 65 N. E. 828, the lumber was not consumed, but was moved away and used on other jobs. * * *

In the case at bar * * * the materialman was entitled to a lien for the value of such part of the lumber as was consumed. Horn v. Clark H. Co. et al., 54 Colo. 522, 131 P. 405, 45 L. R. A. (N. S.) 100. We are of opinion that the judgment of the court below is right, and should be affirmed.

The judgment is affirmed.

RITTENHOUSE & EMBREE CO. v. F. E. BROWN & CO. et al.

Supreme Court of Illinois, 1912. 254 Ill. 549, 98 N. E. 971.

DUNN, C. J. The appellant filed a bill in the superior court of Cook county for a mechanic's lien for lumber furnished by appellant, as a subcontractor, to F. E. Brown & Co., the original contractor with the appellee Adelaide F. Jones, for the reinforced concrete construction required in the erection of a three-story brick and reinforced concrete laundry building. The lumber was of the value of $547.11, of which $270 was paid, and a lien was claimed for the remainder, $277.11. The lumber did not enter into the permanent construction of the building, and was not furnished for that purpose, but for false work, the molds and forms into which the concrete was poured. It was afterwards all taken away. On a hearing the bill was dismissed for want of equity.

Section 1 of the Mechanic's Lien Law (Hurd's Rev. St. 1911, c. 82) declares that any person who shall by contract with the owner "furnish material, fixtures, apparatus or machinery for the purpose of, or in the building, altering, repairing or ornamenting any house or other building," etc., shall be known as a contractor and shall have a lien "for the amount due to him for such material, fixtures, apparatus, machinery, services or labor," etc. Section 7 provides that no lien for material shall be defeated "because of lack of proof that the material after the delivery thereof, actually entered into the construction of such building or improvement, although it be shown that such material was not actually used in the construction of such building or improvement: Provided, it is shown that such material was delivered either to such owner or his agent for such building or improvement to be used in such building or improvement, or at the place where said building or improvement was being constructed, for the purpose of being used in construction."

Prior to the revision of this law in 1895 (Laws 1895, p. 225) it was well settled that a lien could be enforced only to the extent of materials actually used in the construction of the building. Compound Lumber Co. v. Murphy, 169 Ill. 343, 48 N. E. 472. Section 7 of that revision provided that the lien should not be defeated because of lack of proof that the material, after delivery, actually entered into the construction of the building; but it was still required, as it is now under the revision of 1903, that the material should have been delivered for the purpose of being used in the construction. The words "used in such building or improvement" and "used in construction" here mean, in our judgment, more than employed in the process of construction as a means for assisting in the erection of the building. They mean used as a part of the construction, so that the material becomes a part of the completed structure. Under section 21 the subcontractor has a lien as broad as that of the orginial contractor. If the words, "used in such building or improvement" and "used in construction" have so broad a meaning as to apply to materials not used as part of the construction, but employed as a means to assist in the process of construction, then every subcontractor must have a lien, by virtue of section 1, for all the material, fixtures, apparatus, or machinery furnished by him for the purpose of building the house. Every person who sells to a contractor, to be employed in the building of a house, any donkey engine, table, rope, carpenter's or mason's tools, or other implements or devices for carrying on the work, furnishes machinery or apparatus for the purpose of building the house. All such machinery, appliances, and tools are in a sense used in the construction of the building; but we believe no one would contend that the vendor of such articles, to be employed for the purpose mentioned, would have a lien for their purchase price on the building in which they were employed.

We held in Haas Electric Co. v. Springfield Amusement Co., 236 Ill. 452, 86 N. E. 248, 23 L. R. A. (N. S.) 620, 127 Am. St. Rep. 297, that no lien was given for machinery, fixtures, or apparatus without proof that they were so attached to the real estate as to become permanent

fixtures, or that they were used in the proper installation of other lienable things. The lumber furnished by the appellant was not destroyed by the use made of it, though depreciated in value, as no doubt were the tackle, implements, apparatus, and tools employed in the building. It never became or was intended to become the property of the owner of the building, but belonged to the contractor who bought it, employed it in the temporary use for which he obtained it, and took it away to be used again for his own purposes. * * *

The decree of the superior court is affirmed.

Decree affirmed.

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2. Fixtures

The materialman's lien may be obtained only for such articles as were delivered for the purpose of entering into the construction of the improvement itself. Furniture, for example, would not be lienable, for the reason that it could not have been intended to become an integral part of the realty; and this is the essential element. Thus, in considering the problem of what materials are lienable, it is necessary in each case to distinguish between chattels and fixtures. We must seek the legal interpretation as to a real estate "fixture," which is something substantially and permanently annexed to the soil (building), though in its nature removable. The intention to make the article permanent governs in each case.

RIESER v. COMMEAU et al.

Supreme Court of New York, Appellate Division, Second Department, 1908. 129 App. Div. 490, 114 N. Y. S. 154.

Jenks, J. This is an appeal from a judgment of the Special Term in favor of the plaintiff in a suit to foreclose a mechanic's lien. The property proceeded against is known as "Public Library No. 12," in the borough of Richmond, city of New York. The New York Public Library, Astor, Lenox, and Tilden Foundation, executed a contract with the Vreeland Building Company for the building thereof. The Vreeland Company made a contract with Commeau to furnish certain material, and Commeau made a contract with the plaintiff for such work and material, save a certain specified part thereof. This action is against the public library as owner, the Vreeland Company as contractor, and Commeau as subcontractor. The Vreeland Company alone appeals. The question whether there was performance was stoutly contested, but the evidence is sufficient to sustain the finding of the court in favor of the plaintiff. The appellant, however, makes, in addition [another point] against the judgment. * * *

It is contended that the materials furnished were not for the improvement of the realty, but were chattels not affixed. The contract

between the plaintiff and Commeau called for double cases with shelves, exhibition cases, partition base, cupboards, a platform, lockers, dressers, bulletin boards, and supply cases. It was required that the materials used in the construction of the various cases, lockers, railing, bulletin boards, etc., shall be of the same wood as the finish of the rooms in which they are installed. There is evidence that the shelves were measured with reference to the rooms and constructed to fit into the spaces, with the exception of one platform expressly made portable. These various articles were fastened to the realty by holdfasts, nails, screws, angle irons, and the like. Kellogg, the defendant's architect, testified that to remove the cases would do material injury to them and the wall; that the wall was not finished behind the cases. The question is whether in fact and intention the work and materials have become part and parcel of the building. Ward v. Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674. Were the labor performed and materials furnished for the purpose of making a permanent accession to the realty? Watts-Campbell Co. v. Yuengling, 125 N. Y. 5, 25 N. E. 1060.

Referring to machinery, the court in Buchannan v. Cole, 57 Mo. App. 11, said: "The controlling question in such cases is, was the machinery furnished and received with the intention of forming integral parts of a building which was constructed for a certain purpose?"

In Union Stove Works v. Klingman, 20 App. Div., at page 451, 46 N. Y. S., at page 722, affirmed 164 N. Y. 589, 58 N. E. 1093, the court say: "While it is true that some portion of the material, for which recovery has been had, could have been removed without difficulty, notably the ranges, the object of the erection of the buildings and the circumstances surrounding their purchase, and their annexation to the freehold, are sufficient to support the conclusion that it was the intent of the parties that they should be annexed to the realty and pass as fixtures."

The structure was exclusively designed for a public library and devoted to such purpose. The material furnished is all adapted to such a structure, and much of it, e. g., shelves, cases, and the like, could not be used save in like structures. It was constructed to harmonize with the building, and both fitted and fastened to it. The building could not be used for library purposes without it or like equipment. Indeed, the witness Rieser testifies: "I don't think that building and the walls would be complete without those particular fixtures; it wouldn't be a library, it would be a room."

The inquiry in such a case approaches nearly the doctrine of fixtures. Ward v. Kilpatrick, supra. In Grosz v. Jackson, 6 Daly, 463, the court held, in consideration of the fact that the structure was a theater, that chairs adapted and screwed down in the auditorium for the use of the audience were subject to a mechanic's lien. So desks and platforms in a public school were considered as fixtures. Held v. City of New York, 83 App. Div. 509, 82 N. Y. S. 426. And likewise shop shelves set up so as to conform to the building. Rinzel v. Stumpf, 116 Wis. 287, 93 N. W. 36. And the court found upon the conflicting evidence that the said work and materials were actually used

in and upon the building on the premises, and, "if there was any evidence to sustain such finding, it followed that the plaintiff was entitled to a lien." Nason Ice Machine Co. v. Upham, 26 App. Div. 422, 50 N. Y. S. 197. * * *

The judgment must be affirmed, with costs. All concur.

SCHMELING et al. v. ROCKFORD AMUSEMENT CO. et al.

Appellate Court of Illinois, 1910. 154 Ill. App. 308.

Mr. Justice THOMPSON delivered the opinion of the court.

On October 26, 1908, Andrew Ashton, the owner of a building known as the "skating rink," but at that time used as a garage, situated on lot 3, block 13, of the town of West Rockford, leased to the Rockford Amusement Company at a rental of $125 per month the building and premises for a term of five years, commencing December 1, 1908, to be used "for a theater and other amusement purposes, and no other." The lessee was to be allowed the privilege of making such necessary changes in said building as would be required to equip it for the purposes of a theater, and the lessor was to allow to the lessee the sum of $650 to be deducted from the rents at the rate of $35 per month, to be used in making such changes and equipment. The Amusement Company entered into possession, remodeled the building, and equipped it with the necessary scenery, including electrical apparatus. The amusement company contracted obligations of about $5,000 in remodeling and fitting the building for a theater, on which it paid about $3,000 and failing to meet its obligations, Emil W. Schmeling filed a bill in chancery on March 17, 1909, to foreclose a mechanic's lien for work and material furnished in remodeling the building, for $3,549.86, on which $2,000 had been paid. * * * The case was heard before the court and a decree entered finding that Ashton, the owner of fee, had made the lease as alleged and had permitted the premises to be improved with full knowledge that the improvements were being made so far as concerns the parties claiming liens; that the complainant is entitled to a lien for a balance unpaid of $1,549.86; * * *.

It is * * * insisted that the materials furnished by the appellees and the work done were not of such a character as to entitle the appellees to mechanics' liens. * * * [As to the portion of the lien claim covered by work done and material furnished in permanently wiring the building for electricity, material that could not be removed without tearing the building in pieces, there can be no question but that claimant is entitled to lien. The items of $146 for one asbestos curtain, $100 for one center door piece four wings and two set doors, with various other items of scenery, presents a question of a somewhat different nature. Permanent fixtures only are lienable.] The rule for determining what constitutes a fixture adopted by the courts of this state is:

"First, real or constructive annexation of the thing in question to the realty; second, appropriation or adaptation to the use or purposes of that part of the realty with which it is connected; and third, the intention of the party making the annexation to make it a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made." Fifield v. Farmers' National Bank, 148 Ill. 163 [35 N. E. 802, 39 Am. St. Rep. 166].

Under the lease made between the [owner] appellant and the Rockford Amusement Company [the owner gave his consent that the building should be remodeled, therefore a lien for such remodeling was properly chargeable against his property. On the question whether the materials furnished were lienable, the proof shows that the Rockford Amusement Company] bought the scenery in question [from the lien claimant] and had it manufactured specially for this theater; the blocks enclosing the pulleys by which the scenery was operated * * * were nailed fast to the building and were a part of it. * * * The asbestos curtain is fastened to the blocks by endless wire rope and to remove the scenery it would be necessary to remove the blocks and pulleys which are solidly nailed to the building. The scenery is not suitable for use in any other theater except one of the same dimensions as this, and was bought solely for use in this theater and intended for use therein, and each piece is complementary to and a necessary part of the whole, to be used as an entirety. * * *

The proof shows that the fixtures and apparatus furnished, for which liens were allowed, were so attached and used as to become a part of the theater building. Under such a state of facts the appellees were entitled to a lien therefor. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452 [86 N. E. 248, 23 L. R. A. (N. S.) 620, 127 Am. St. Rep. 297]. The decree is therefore affirmed. * * *

SECTION 4.—PUBLIC IMPROVEMENTS

Mechanics' liens may not be acquired against property belonging to the public. If the services rendered or the materials furnished are for the construction of a building on behalf of a county, township, school district, sanitary or drainage district, city, or state, the persons furnishing such services or materials do not have the protection of a lien. The reason for this ruling of the courts is that, since the interests of the public are paramount, property belonging to the public should not be subjected to liens.

In order to give some protection, however, to those persons whose labor and materials are expended in making public improvements, the

mechanic's lien statutes of many states give a lien upon the money due the general contractor. A typical section creating such a lien is as follows:

"Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor having a contract for public improvement for any county, township, school district, city or municipality in this state, shall have a lien on the money, bonds or warrants, due or to become due such contractor under such contract: Provided, such person shall, before payment or delivery thereof is made to such contractor, notify the official of the county, township, school district, city or municipality whose duty it is to pay such contractor of his claim by written notice. * * * The person so claiming a lien shall, within thirty days after filing notice, commence proceedings * * * to enforce his lien. * * * It shall be the duty of the said official, after the notice has been filed with him, to withhold payment of a sum sufficient to pay the amount of such claim, for the period limited for the filing of suit (thirty days). * * * Any officer violating the duty hereby imposed upon him shall be liable on his official bond to the claimant serving such notice for the damages resulting from such violation. * * *"

Thus a claimant may have a lien upon money, bonds, or warrants due or to become due the general contractor. It is to be noted that the claimant cannot have such a lien, however, unless he shall notify the public official whose duty it is to pay the contractor. It is therefore of the utmost importance that the claimant shall see to it that this written notice is delivered to the proper official, charged with the payment of the public money to the general contractor.

CHAPTER 4

PROCEEDINGS TO OBTAIN LIEN

SECTION 1.—WHAT IS REQUIRED OF THE CONTRACTOR

1. The Notice of Claim for Lien

In order that the contractor may obtain a lien against the building or improvement into which he has put his materials, or services, or both, to secure the payment of the contract price, the statutes generally require that he file for public record, within a designated time, an instrument showing that a lien on the described property is claimed by him. This instrument is variously called the "claim for lien," or the "notice of claim," or the "notice of lien." Usually this notice of claim must be verified by the sworn affidavit of the claimant.

This act of publicly recording a sworn notice of claim is a condition precedent to obtaining a lien by the contractor; and it is important to note that by "contractor" is meant the man who sells *directly,* or renders services *directly,* to the owner; that is, contracts with the owner. Thus a notice of claim may be required of the materialman, the architect, the engineer, the superintendent, the builder, or even of the mechanic or laborer, provided each or any of these contracts directly with the owner. Only the relationship of owner and contractor is here involved, and under this subject we should not confuse that of owner and subcontractor.

The usual statutory requirement of the notice of claim for lien is as follows:

"No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within four months after completion, or if extra or additional work is done, * * * within four months after the completion of such extra or additional work, * * * he shall either bring suit to enforce his lien therefor or shall file with the clerk of the circuit court in the county in which the building * * * or improvement to be charged with the lien is situated, a claim for lien, verified by * * * affidavit, * * * which shall consist of a brief statement of the contract, the balance due after allowing all credits, and a sufficiently correct description of the lot * * * or tract of land to identify the same. Such claim for lien may be filed at any time after the contract is made, and as to the owner may be filed * * * within two years after the completion of said contract. * * *" Laws Ill. 1903, p. 233, § 7.

As mentioned above, the lien acts of nearly all the states provide for the filing of the claim for lien, but they differ as to the length of time for filing, and at what point the stated time begins to run. On this point it is necessary to consult the statute of the particular state within which the improvement is located. As to the length of time for filing, the usual limits are four months, sixty days, thirty days, or twenty days. The Mechanic's Lien Act of Illinois, from which the above section is quoted, provides for two periods, one of four months, applicable to the priority of the contractor's lien over those of "other creditors or incumbrancers or purchasers," and one of two years' duration, within which, as to the owner alone, the contractor may obtain his lien by filing the required notice. The four months period is sometimes referred to as "the four months secret lien," referring to the fact that for four months after completion of the construction the public records may fail to disclose the fact of liens upon the premises, although in fact such liens may exist, and may be perfected by filing the notice even at the very end of the four months period. It is therefore advisable for a prospective purchaser or mortgagee of a newly completed building to require from the owner waivers of lien from the contractors, or a bond securing him from possible lien claims.

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2. When the Time to File Begins to Run

The lien statutes of the different states differ also as to the point when the stated time within which the notice of lien may be filed begins to run. In the Illinois act, the period commences upon the "completion of the contract," and many states have a similar provision. Just what is completion of the contract is, however, sometimes difficult to decide. Questions arising in the interpretation of this provision are considered in the cases following.

CHICAGO LUMBER CO. v. MERRIMACK RIVER SAV. BANK.

Supreme Court of Kansas, 1893. 52 Kan. 410, 34 P. 1045.

Allen, J. This action was brought by the Chicago Lumber Company to foreclose a mechanic's lien filed August 7, 1887, on a quarter section of land, and an unfinished mill situated thereon. The plaintiff's claim is for materials furnished by them to Douglass & Bixby, the owners of the property. The first item was furnished, as appears from the bill attached to the statement for a lien, on November 7, 1882, and the last item on December 13, 1883. The defendant bank claims under a mortgage dated June 29, 1883, for $8,000. There was a prior mortgage on the land in controversy for $1,000, * * *. It appears that the last work was done on the mill building late in the fall of 1884,

and that it was then left in an unfinished condition, and has so remained ever since.

Various matters are discussed in the briefs by both parties, which, under the view we take of the case, it is unnecessary to mention. The statute under which the lien is claimed provides that the statement shall be filed within four months after the completion of the building. It appears that this building never was, in fact, completed; but it has been held by this court, and is certainly consistent with the spirit of the law, that, where the work is abandoned, parties entitled to a lien shall not be thereby deprived of their rights nor prevented from enforcing them, but that when the work is abandoned the building shall be deemed completed for the purpose of protecting their rights. In Shaw v. Stewart, 43 Kan. 572, 23 P. 616, it was said: "All the authorities sustain the proposition that if the abandonment of the work upon the building had been caused by Stewart, the owner of the property, plaintiffs would be entitled to their liens, as the abandonment of the work would have been deemed a completion of the work for the purpose of filing such liens. Catlin v. Douglass, 33 F. 569; Trammell v. Mount (Mo. Sup.) 4 S. W. 377." See, also, Perry v. Conroy, 22 Kan. 716; Crawford v. Blackman, 30 Kan. 527, 1 P. 136.

The plaintiff in error strenuously contends that the abandonment does not take place until the owners have arrived at the mental conclusion that they cannot proceed with the work. If this construction of the law were to be adopted, parties entitled to a lien would find themselves in a very precarious predicament. It might be a matter of very great difficulty to keep track of the mental operations of the owners, who in most instances would be interested in defeating, rather than in maintaining, liens upon their property. If one may cease to work on a building when partially completed, and leave some portion unfinished with the purpose and intention of proceeding with the work at some future and indefinite period, the time when laborers, contractors, and material men may enforce their demands will be indefinitely postponed, and they will be put in the most hazardous position of being defeated ultimately of their liens if they fail to file them within the time prescribed by the statute, or being defeated in a suit if the work be thereafter resumed. W think the contention of the plaintiff in error that abandonment of work on this mill is a mental act of the owners is unsound; that it is a physical, visible condition, to be determined from an inspection of the premises. When Douglass & Bixby ceased to do anything towards the completion of their building they abandoned the work, no matter how much they may have hoped, expected, or intended to be able to resume, if subsequent events show that they never did in fact resume work. If the owner temporarily suspend work on the building, and thereafter resume, no doubt liens might be taken within the statutory period after completion of the work; and, if it were a fact in this case that the owners had resumed work for the purpose of completing the building as originally planned, a different question would be presented. It is immaterial what the cause of the abandonment may have been. * * * Work was actually

abandoned late in 1884. If we were to say that the statement which was filed by the plaintiff on the 7th day of August, 1887, more than two and a half years later, was in time, it seems to us that the limit prescribed by the statute would be practically construed away, and that no one could ever determine when to file his statement, or when the time for filing liens had expired. * * *

SHAW et al. v. FJELLMAN et al.

Supreme Court of Minnesota, 1898. 72 Minn. 465, 75 N. W. 705.

CANTY, J. This is an action to foreclose a mechanic's lien, and the question raised is whether the lien statement was filed within the statutory time. The complaint alleges that the defendant Fjellman was the owner of the land on which he was erecting a building; that on March 30, 1895, he entered into an agreement with plaintiffs whereby it was agreed that they should furnish, place, and construct "a plumbing and heating plant" in the building, complete said plant in a good and workmanlike manner, "keep and maintain the same in good and perfect condition for one year from the date of the completion" of the same and its acceptance by Fjellman, and execute to him a written guaranty to that effect, and that, in consideration thereof, he agreed that at the end of such year, on the full performance by plaintiffs of said contract on their part, he would pay them the sum of $1,075; that plaintiffs commenced the construction of said plant March 31, 1895, and the same was completed December 31, 1895, and accepted by Fjellman January 10, 1896; that, on the latter date, plaintiffs executed a written guaranty pursuant to the contract, and, in performance and fulfillment of the same during the year in which said guaranty was in force, furnished labor and material rendered necessary in order to maintain the plant and keep it in repair; that said repairs were furnished June 8, 1896, November 19, 1896, and December 31, 1896, all of which are set out in a bill of particulars made a part of the complaint. The lien statement was filed March 13, 1897. It is further alleged that the defendants Busch and Anheuser-Busch Brewing Company claim some interest in the property superior to the right of plaintiffs. These two defendants demurred to the complaint, on the ground that it does not state a cause of action; and, from an order sustaining the demurrer, plaintiffs appeal.

The statute (section 6236, Gen. St. 1894) requires the lien statement to be filed within 90 days after the time of furnishing the last item of the labor or material, and respondents contend that in this case the lien statement was not filed within the 90 days; that, in order to preserve a lien for the labor and material furnished in constructing the plant, a lien statement therefor should have been filed within 90 days after the same was completed; and that the time for filing the lien statement for the same cannot be extended by reason of the labor and material furnished in maintaining the plant and keeping it in repair afterwards. As against Fjellman, who made the contract, the lien

statement was, in our opinion, filed in time. Of course, the stipulation for maintaining the plant for one year did not of itself extend the time for filing the lien. On the contrary, this extension of the time of payment, if no additional labor or material had been furnished, would have waived the right to a lien for what had been done. Flenniken v. Liscoe, 64 Minn. 269, 66 N. W. 979. But, when plaintiffs entered into the contract, they took their chances as to whether or not it would be necessary to furnish, during the year, additional labor or material for which a lien might be claimed, and, if none was so furnished within 90 days of the end of the year, the lien for the whole claim would be waived.

The contract to construct the plant, and maintain it for one year after it was constructed, was, as between plaintiffs and Fjellman, one entire contract, even though it provided that a written guaranty should be executed when the original construction was completed. As against Fjellman, who made the contract, it is an entirety, and the lien statement was, as against him, filed in time to preserve the lien for the whole claim. But as to an innocent third party, who, after the plant was completed, acquired an interest in the property, without actual notice or knowledge of the character of the contract, it should be regarded as in fact two separate contracts, one of which was to be completely performed before the performance of the other was to be commenced, and that, as to such a third party, the lien statement was not filed in time. If, by one contract, A. should employ B. to construct a house on the land of the former, and at the end of six months, after the house was fully completed, to commence the construction of a barn on the same land, and thereafter construct the same, it might, as between the parties, be an entire contract, requiring the filing of but one lien statement, while as to such third parties it might, for some purposes, be regarded as two separate transactions, so that the time for filing the lien statement for each job or transaction would commence to run from the time of completing the same.

The same principle may apply in this case. As against a mechanic's lien, the rights of subsequent purchasers and incumbrancers are not, as a general rule, any greater than the rights of the owner who contracted for the improvement. But there are exceptions to this rule. Thus, after it was supposed that the work had been completed, and it was accepted or taken possession of by the owner, he or his agent may extend the time for filing the lien by requiring additional work to be done to remedy defects subsequently discovered, and the time for filing the lien will commence to run from the completion of such additional work. National Stock Yards v. O'Reilly, 85 Ill. 546; Water-Supply Co v. Riter, 138 Ind. 170, 37 N. E. 652; McIntyre v. Trautner, 63 Cal. 429. But after the work has been apparently completed, and all further work has ceased, for an unreasonable length of time, and in the meantime a third party has acquired a right or interest in good faith, for a valuable consideration, the owner who made the contract may thereafter waive his own rights, and extend, as against himself, the time for filing a lien by consenting to the performance of further work

to remedy such defects; but he cannot waive the rights of such a third party, or extend the time of filing a lien as against him. Nichols v. Culver, 51 Conn. 177; Cole v. Uhl, 46 Conn. 296; Sanford v. Frost, 41 Conn. 617; Conlee v. Clark (Ind. App.) 42 N. E. 762.

In our opinion, the same principles apply here. But the burden is on these respondents to show that they are innocent purchasers or incumbrancers for value, without notice; and, until that appears, they stand in no better position than Fjellman himself. * * *

This disposes of the case, and the order appealed from is reversed.

SECTION 2.—WHAT IS REQUIRED OF THE SUBCONTRACTOR

1. The Notice to the Owner

The proceedings to obtain a lien which are required of the subcontractor differ from those which the contractor must follow, in that the notice of claim for lien of the subcontractor, instead of being filed for public record, must be served personally upon the owner. The lien statutes generally contain provisions similar to the following:

"Subcontractors, or party furnishing labor or materials, may, at any time after making his contract with the contractor, and shall within sixty days after the completion thereof, cause a written notice of his claim and the amount due or to become due thereunder, to be personally served on the owner or his agent or architect, or the superintendent having charge of the building or improvement."

A direct lien is given to the subcontractor and to sub-subcontractors, the essential thing required being personal service of the notice thereof upon the owner. By subcontractor is meant the person who contracts, not with the owner, but with the principal contractor. Such person may be the dealer in materials, the laborer, the mechanic, etc. Wherever the subcontractor is in any doubt as to the honesty or solvency of the principal contractor, he should, at any time after the contract is made between the subcontractor and the contractor, give the written notice of claim for lien to the owner of the amount to become due him, and thus protect himself by the security of a lien. The notice may be very informal, so long as it is in writing, and contains a statement of the work for which claim is made, the amount of the claim, and a description of the property upon which the work or materials are to be, or have been, expended.

2. The Time Within Which the Notice Must be Served

BOOTH v. VON BEREN.

Supreme Court of Connecticut, 1909. 82 Conn. 298, 73 A. 775.

On October 1, 1907, one Humphrey, a builder, entered into a written agreement with the defendant Von Beren to build a house for the latter for the sum of $5,475, for which there is now due Humphrey under the contract the sum of $1,275. [Mansfield, a dealer in building materials, furnished to Humphrey the lumber used in Von Beren's house; and Mansfield has filed an interpleader in this suit claiming a lien upon the property in the sum of $827, praying that out of the money due Humphrey from Von Beren his lien be satisfied. The question is whether Mansfield has satisfied the statutory requirements so as to be entitled to a lien. It appears from the evidence that Mansfield commenced to deliver material upon the order of Humphrey at the Von Beren house October 21, 1907, and ceased to deliver material to, or render any services in, the construction of said house on December 27, 1907. On March 25, 1908, Mansfield gave notice to Von Beren of his intention to claim a lien for the materials furnished.]

Hall, J. [Mansfield was a subcontractor.] * * * To acquire a valid lien for the materials which he furnished it was therefore necessary for him to comply with the provisions of section 4137 of the General Statutes [of 1902. This section required him] after commencing, and not later than 60 days after ceasing to furnish the materials, to give written notice to the owner of his intention to claim a lien therefor on said building. * * * He actually furnished no materials to Humphrey after December 27, 1907, [and he did not serve the notice of claim for lien upon Von Beren until March 25, 1908. He therefore did not serve the notice within the time required by the provisions of the mechanics' lien law, and is not entitled to a lien.] * * *

SOUTH SIDE LUMBER CO. v. DATE et al.

Appellate Court of Illinois, 1910. 156 Ill. App. 430.[1]

Mr. Justice Smith delivered the opinion of the court. * * * The evidence in the record tends to show that on December 14, 1905, the defendant Sydney S. Date was the owner of the real estate described in the bill of complaint and that four buildings were erected on the premises described under a verbal contract between Date and the Construction Company which was made about December 14, 1905, whereby the Construction Company agreed to build and construct upon the premises four buildings to be used for residence purposes, the Construction Company agreeing to furnish the material and labor for the complete

[1] Statement of facts is omitted.

erection and construction of the buildings, and was to pay in full for the same and turn them over to Date fully completed and paid for, free from all mechanics' liens and in consideration thereof Date was to pay the Construction Company the actual cost of the buildings plus four per cent. thereof; and that Date was not to be personally responsible for any bill for material or labor ordered by, furnished to or accepted by the Construction Company in the erection and construction of the buildings. * * *

[It appears further that on December 24, 1905, the Construction Company, pursuant to the contract, purchased from the complainant Lumber Company, lath and posts as it might order from time to time, and the complainant delivered to the premises for use in said buildings the lumber, posts and lath upon the order of the Construction Company to the amount of $1,989. That the first delivery of material was on December 20, 1905, and the last was a load of posts which was delivered on June 23, 1906. * * * That on October 2, 1906, complainant served on the owner, Date, a notice of its claim for lien. The statute clearly provides that the notice of lien must be personally served upon the owner within the sixty days after the date of completion of the subcontract, and here the last delivery of materials must be taken to be completion.]

Furthermore, the notice attempted to be served on Date, the owner, was not served as required by the statute. The evidence shows that on October 2, 1906, the complainant by its agent delivered to an employee of Lamson & Company, at the office of the firm in * * * Chicago, the notice alleged in the bill of complaint. Date was not in the city of Chicago on that day. The clerk of Lamson & Company promised to hand it to Date. Date was not then a member of the firm of Lamson & Company. * * * He had left his desk in the office of the firm, and went there occasionally for his mail. On the day following, October 3, Date found the notice on his desk. This was not the personal service of a notice within the terms and intent of the statute. * * *

[Therefore we must conclude that the alleged notice was not served upon the owner within the time and manner required to entitle the complainant to a lien.] * * *

CHAPTER 5

RIGHTS AND DUTIES OF THE OWNER, CONTRACTOR, AND SUBCONTRACTOR

SECTION 1.—RIGHTS AND DUTIES OF THE OWNER

Duty to Require Affidavit from Contractor.—The owner, before paying the contractor, must secure from him a statement, in writing and under oath, of the names of all parties furnishing materials and labor and of the amounts due or to become due to each. If it appears from this affidavit that there are sums due or to become due such subcontractors, materialmen, mechanics, or laborers, it is the duty of the owner to retain from any money due the contractor an amount sufficient to pay all such demands. And it is the further duty of the owner to pay over the money so retained to the parties entitled thereto.

Effect of Failure to Comply with This Requirement.—If the owner fails to secure from the contractor this affidavit, or if, where the affidavit is furnished, the owner pays the contractor the amount due him, without retaining sufficient money to satisfy the claims shown by the affidavit due to subcontractors, such payment by the owner is wrongful, and will not protect him; that is, in such case the owner will have to pay twice. Such wrongful payment will leave him open to the liens of the subcontractors shown in the affidavit.

Owner's Duty to Require Similar Affidavit from the Subcontractor.—Where the affidavit of the contractor shows sums due or to become due to a subcontractor to whom all or a portion of the contract has been sublet, it is the further duty of the owner to require from the *subcontractor* a similar affidavit, containing a statement of the persons furnishing him labor and materials, giving their names and the sums due or to become due to each of them, and to retain from the sum he is about to pay over to the subcontractor an amount sufficient to cover their claims, and to pay over the money so retained to these sub-subcontractors.

Right of Owner to Rely upon the Affidavit.—Where the owner has secured the required affidavit from the contractor or subcontractor, before paying the sums due, the owner is fully protected by the payment, unless he has been directly notified by the subcontractors or sub-subcontractors.

Where the affidavit submitted is false, as failing to show amounts due to subcontractors, nevertheless the owner will be protected from the liens of such subcontractors by his payment to the contractor, for the owner may rely absolutely upon the affidavit, provided he has not been notified directly by the subcontractors of their claims.

SECTION 2.—RIGHTS AND DUTIES OF THE CONTRACTOR

Contractor's Duty to File for Record Notice of Claim for Lien.—As discussed in the preceding chapter, where the contractor seeks to establish a lien which will be prior to other incumbrances, he must, within four months of completion of his contract, either start suit upon his lien claim, or file for record with the proper county official a sufficient notice of claim for lien. The reason for this provision is so that prospective purchasers or mortgagees of the property may be informed that the owner's rights therein are subject to lien. As to the owner himself, the suit or notice of claim will be in time, if filed within two years of completion of the contract.

Contractor's Duty to Furnish Affidavit.—As stated in the preceding section, it is not only the duty of the owner to require, but also the duty of the contractor to furnish, a sworn statement of the names of all parties furnishing material and labor, and the amounts due or to become due each. Not until he has furnished the owner this affidavit has the contractor any right against the owner for the money due on the contract.

SECTION 3.—RIGHTS AND DUTIES OF THE SUBCONTRACTOR

Subcontractor's Duty to Serve Notice of Lien on Owner.—Where the contractor furnishes to the owner an honest and correct affidavit of the names and sums due all subcontractors, this is sufficient to protect the subcontractors, as it is unlikely that the owner will neglect to retain out of the money due the contractor an amount sufficient to pay the subcontractors' claims. But should the original contractor, in giving this statement to the owner, either through fraud or mistake, fail to include the amount, or a part thereof, due to any subcontractor, and the owner, relying upon the affidavit of the original contractor, pays him according to said affidavit, the subcontractor will lose his claim up-

on the owner accordingly, unless the subcontractor has given the notice of his claim directly to the owner. Subcontractors, whether they be materialmen, laborers, superintendents, or engineers employed directly by the contractor, should not depend upon the accuracy and honesty of the principal contractor, but should notify the owner directly of their claims, as already discussed in section 2, chapter 4.

Subcontractor's Rights Against Owner and Contractor.—The rights of the subcontractor against the contractor are upon the contract existing between them, and are determined by the principles of the law of contracts. But in addition to his rights against the contractor, by virtue of the special provisions of the lien law, the subcontractor also has rights against the owner, even though he has not contracted with him. Where the owner is notified of the name of the subcontractor and the amount due him from the principal contractor, either by the affidavit of the principal contractor or by the notice of claim served directly upon the owner by the subcontractor himself, he has a right against the owner to secure payment of the amount due him. As already stated, if the subcontractor can prove service of the notice of claim upon the owner before the owner has paid the principal contractor, the subcontractor may demand payment of his claim direct from the owner.

It is most important to note that, although the subcontractor has sixty days from the completion of his contract within which to serve his notice of claim upon the owner, if before that time the owner has paid the principal contractor in full, after having secured an affidavit from the principal contractor which fails to show this subcontractor's claim, the owner will be free from all claim of lien on the part of the subcontractor. Here the notice to the owner, though within the sixty days, is too late.

BERKSHIRE WAREHOUSE CO. v. HILGER & CO. et al.

Supreme Court of Illinois, 1915. 268 Ill. 463, 109 N. E. 287.

CARTER, J. [This was an action by the Edward Hines Lumber Company, an intervening petitioner, against the Berkshire Warehouse Company, to enforce an alleged mechanic's lien for materials furnished Hilger & Co., general contractors.]

In July, 1909, appellee made a contract with Hilger & Co., a general contractor in Chicago, to construct certain improvements for $75,000 on the premises owned by appellee. Work was begun under this contract July 8, 1909, and continued, various subcontractors furnishing labor and material. Hilger & Co. was paid by appellee on this contract on August 9, 1909, $2,500, August 20, $2,500, and September 4, $5,000, without requiring, at the time these payments were made, statements to be furnished by Hilger & Co., as provided by section 5 of the

mechanic's lien law of 1903. [Laws 1903, p. 232.] August 16, 1909, appellant entered into an agreement with Hilger & Co. to furnish lumber and building material for use in the erection of the improvement on said premises, no particular quantity being ordered at that time, and no definite price being fixed therefor, except that the orders were to be given from time to time as the materials were needed, at the then market price. September 28, 1909, appellee received from Hilger & Co. a sworn statement in accordance with said section 5 of the mechanic's lien law, and thereafter, under this statement, paid $17,000. On October 22d Hilger & Co. furnished another sworn statement, under which it was paid $15,000; and on November 16th it made another statement, as required by the Mechanic's Lien Act, under which it was paid, November 18th, $16,000. The name of appellant did not appear on either of these three statements as furnishing material or doing work on the contract. * * *

The principal question requiring our consideration is whether the failure to make the statements required by the statute, before the said payments of August 9th and 20th and September 4th were made, renders the property of appellee subject to a mechanic's lien up to $10,000, the amount of those payments. * * * In the recent decision of Knickerbocker Ice Co. v. Halsey Bros. Co., 262 Ill. 241, 104 N. E. 665, this court, in construing said section 5 of the mechanic's lien statute, held that said section did not limit a contractor to one sworn statement to be made to the owner; that the conditions of the contract may change between the time of payments; that "new subcontracts may have been entered into in the meantime or payments may have been made upon subcontracts existing at the time the first payment was made. In order to be apprised of the exact situation at the time any payment is demanded by and made to the contractor, whether it be the first payment made under the contract or any subsequent payment, the owner is entitled, under said section 5, to require, and it is the duty of the contractor to make, a statement showing the situation as it then exists. If any subcontractor is not satisfied to rely upon the contractor in the making of these statements and to abide by the statements as made, it is his privilege, under the statute, to serve an independent notice upon the owner, of the amount due or to become due under his subcontract, which shall bind the owner notwithstanding any statement made by the contractor."

The opinion further holds that, in the absence of a notice by the subcontractor, the owner has a right to rely upon the sworn statement of the contractor unless he knows from other sources that such statement is false. * * *

On November 16, 1909, the last time a statement by Hilger & Co. was filed in accordance with the requirements of section 5 of this statute, appellee had on hand ample funds to pay the claim of the appellant. That statement showed that there was due and owing contractors and materialmen $23,874.08, and the record shows appellee still owed on the contract approximately $27,000. Appellant's claim amounts to only $857.57, and it could have protected that claim by fil-

ing notice, as the statute provided, before this money was paid out, but it did not serve such notice until January 20, 1910, at which time, under said statement of November 16, 1909, the appellee had paid out the money to the contractor and subcontractors.

At the time of the first payment here in question, August 9, 1909, there was no money due or owing to appellant. Neither would it have been possible to figure out, at the date of the payments on August 20th and September 4th, what was due or to become due appellant, as the record does not show that it had delivered any material previous to either of those dates. Indeed, had statements been required on those dates, and had appellant's claim been referred to in any way on such statements, it would not have protected appellant's claim in any manner, in view of the fact that the subsequent statements made in conformity with the statute, September 28th and November 16th, did not contain any reference to the claim. Appellee had a right to rely on those statements. Obviously, appellant was not injured in any way by the failure of the appellee to require the filing of statements before making the payments of August 9th, August 20th, and September 4th, respectively. The appellate and trial courts properly construed the statute on the question here under consideration.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHAPTER 6

ENFORCEMENT OF LIENS

SECTION 1.—REMEDIES OF THE CONTRACTOR

Remedy at Law for Breach of Contract.—If payment of the amount provided for in the building contract is not made to the contractor by the owner when due, the owner is in default as having broken the contract. The contractor may then, of course, sue the owner at law for the money due him; but this remedy will only give him a judgment, and the general lien of such judgment against the owner's property, after which a levy and sale to satisfy the judgment will still be necessary.

Remedy in Equity of Foreclosure.—The building contractor, however, already has a specific lien against the particular improvement, by virtue of the mechanic's lien law; and this statute gives him an immediate right against the specific property of the owner, a right to apply to a court of equity for a decree of sale of the property and from the proceeds thereof to pay the contractor. This right is called a right of foreclosure, and the procedure is similar to the foreclosure of a mortgage.

SECTION 2.—REMEDIES OF THE SUBCONTRACTOR

Remedy in Equity of Foreclosure.—The subcontractor, whether he be a materialman, mechanic, laborer, engineer or superintendent, has the same remedy of foreclosure of his lien as has the contractor. He, too, may apply to a court of equity for a forced sale of the owner's property, and payment of the subcontractor's claim out of the proceeds.

Remedy at Law of Judgment Against Owner.—In addition, many lien statutes give the subcontractor an action at law against the owner, providing that by joining both the contractor and owner as codefendants in the same suit he may get judgment against both. The right of action against the contractor arises, of course, out of his contract; but that against the owner is created solely by the lien statute.

Conditions Precedent to Enforcement of Liens.—It should be borne in mind that, since the contractor's and subcontractor's rights of equitable foreclosure against the owner's property, and the subcontractor's right to sue the owner, are all rights created solely by the mechanic's lien statutes, the provisions of these statutes as hereinbefore discussed, as to acquiring the lien, must be strictly adhered to. In any suit at law or in equity to enforce a mechanic's lien, the lien claimant must, of course, prove that he has served the required notices and fully performed the services or delivered the materials requisite to entitle him to a lien.

SECTION 3.—PRIORITIES

As Between Mechanics' Liens and Other Incumbrances.—A mechanic's lien has priority over a mortgage placed upon the property *after* the date of the contract for the materials and labor. As to mortgage already upon property at the time the owner lets the contract for the improvement, even here many lien statutes give the lien claimant priority as to the value of the *improvement,* over the mortgagee; although the latter will have priority in the value of the land. A quotation from such a statute may make this point clearer:

"No incumbrance upon land, though created before the making of the contract for the improvement, shall operate upon the building erected until a lien in favor of the persons having done work or furnished materials shall have been satisfied. * * * As between incumbrancers and lien creditors, all previous incumbrancers shall be preferred to the extent of the value of the land, and the lien creditor shall be preferred to the value of the improvements erected on said premises, and the court shall decide what proportion of the proceeds of any sale shall be paid to the several parties in interest. * * *"

In such provisions as above quoted the presumption is indulged that the improvements placed upon the premises have enhanced their value to the extent of the lien claim, and therefore the lien creditors are justly entitled to a prior lien for the amount of the new improvements which they have provided. Of course it is only where the sale price of the premises fails to bring the total amount of the liens and mortgage that the question of priorities arises.

As Between Different Mechanics' Liens.—As a general rule, all mechanics' liens, on the same property and arising out of the erection of the same building or improvement, irrespective of the date of filing, stand on an equality, and share pro rata in the amount realized from a

sale of the property where the proceeds of such sale are not enough to pay all in full.

An almost universal exception to the above rule is found in favor of laborers. The claim of any person for wages as a laborer is usually made a preferred lien. A typical section so providing is as follows:

"Upon all questions arising between different contractors having liens under this act, no preference shall be given to him whose contract was made first, except the claim of any person for wages by him personally performed, shall be a preferred lien."

SOULE et al. v. BORELLI et al.

Supreme Court of Errors of Connecticut, 1908. 80 Conn. 392, 68 A. 979.

For many years prior to January 1, 1904, the plaintiffs, Turney Soule and George H. Lines, as sole copartners, under the name of T. Soule & Co., hereinafter referred to as Soule & Co., were engaged in business in New Milford as builders and dealers in lumber, hardware, and builders' material. D. E. Soule, the brother of Turney Soule, had for some years prior to April, 1904, been employed by the copartnership as foreman of construction. In that capacity he was accustomed to hire and have charge of the men, and to select and order the materials required. Immediately after the fire which on May 2, 1902, destroyed nearly all the business portion of New Milford, including a hotel owned, as was the land on which it stood, by Mrs. Borelli, the wife of the defendant Andrew Borelli, it was determined by Soule & Co. that they would thereafter take construction work only upon commission. * * *

A few days after the fire Mrs. Borelli, accompanied by her husband, * * * drove into the lumber yard of Soule & Co., and there had an interview with Mr. Lines, the junior partner. They asked Mr. Lines if his firm could promise them help to rebuild the destroyed hotel. Lines told her that, subject to other buildings that had to come in ahead, they would do so. Mrs. Borelli asked upon what terms, and how. Lines replied that they had decided to take no jobs except upon a 10 per cent. commission basis; that is, that they would furnish the labor and materials at cost, and add thereto 10 per cent. commission. Mrs. Borelli thereupon accepted the proposition of Lines to do the work upon these terms, telling him to go ahead as soon as they could.

On June 10, 1902, the firm, pursuant to this agreement and direction, began to furnish labor and materials in the erection of the building, and continued uninterruptedly to do so until it was completed on January 5, 1903. The last charge upon the account * * * showed an indebtedness to Soule & Co. of $2,612.82, and on March 4, 1903, a lien was filed upon the property for said sum in favor of the plaintiffs. * * * August 11, 1902, Mr. and Mrs. Borelli mortgaged the premises in question to J. Le Roy Buck, conservator, to secure a note of $5,000.

Buck having died, the defendant Adeline Buck succeeded him in the execution of said trust.

October 10, 1902, the Borellis gave a second mortgage of said premises to the defendant Bennitt to secure a note for the like sum of $5,000. This note and mortgage were given for the purpose of raising money to pay bills in connection with the construction of said building, including that of Soule & Co. [Upon foreclosure and sale, the property brought less than the total of the mortgages and lien claims, and the sole question for decision here is that of priority.]

PRENTICE, J. * * * The lien, by the express provision of the statute, took precedence of any incumbrance originating after the contractor began to furnish materials. Gen. St. 1902, § 4135. This date was June 10, 1902. The first of the mortgages sought to be foreclosed was not placed upon the property until August 11, 1902. The lien is therefore entitled to priority over them. The fact that labor and material was furnished after the last mortgage was given, the value of which exceeded the amount found due upon the completion of the work, or that the payments to the contractor may have exceeded the charges upon its books at or subsequent to the date of either mortgage, or that the proceeds of a mortgage loan may have been used in making payments to the contractor which, when credited upon its books, exceeded in the aggregate the charges then thereon, or that the contractor knew that the money paid to him, with the result indicated, was the proceeds of such loan, would not, one or all of them, if established, suffice to postpone the lien to the mortgage. The statute is too explicit to admit of any such construction. The contract was a single, indivisible one, comprehending all that was done, and its execution was unbroken in its continuity. By force of the statute there was embodied in it the power to charge the property, as of the time its execution was begun, for all the materials furnished and services rendered by virtue of it. * * *

CHAPTER 7

WAIVER OF LIEN

SECTION 1.—EXPRESS WAIVER

In General.—The right to a lien, like other legal rights, may be waived by the person entitled to it. The waiver may be made by an express agreement of the parties, as where the contractor agrees in the original contract with the owner that he will not claim a lien upon the premises. In such case the contractor has given up his right to a lien, and thereafter his remedy for payment of the contract price is solely in an action at law on the contract.

Necessity for Consideration for Waiver.—Any waiver of lien, express or implied, must be supported by a consideration. Where the original contract contains a clause waiving liens, the consideration is found in the undertaking of the owner to pay the contract price. Where, however, an agreement to waive the right to a lien is entered between the owner and contractor after the signing of the contract, the promise to waive the lien right must be supported by a new consideration.

Statutory Provisions as to Waiver.—The lien statutes of many states contain provision for waiver by the general contractor of all liens upon certain conditions; that is, where the original construction contract provides for delivery of the building or improvement free and clear of all liens, such a term operates as a waiver, not only of the lien of the general contractor, but also of the liens of subcontractors, laborers, materialmen, and sub-subcontractors. Such statutory provisions are conditioned upon the filing of this agreement to waive all liens in the office of the county recorder of the county where the improvement is situated, within ten days after the execution of the principal contract, or, as an alternative, actual notice of the waiver to subcontractors and materialmen. Such statutory provision is as follows:

"* * * If the legal effect of any contract between the owner and contractor is that no lien or claim may be filed or maintained by any one, such provision shall be binding; but the only admissible evidence thereof as against a subcontractor or materialman, shall be proof of actual notice thereof to him before any labor or material is furnished by him; or proof that a duly written and signed stipulation or agreement to that effect has been filed in the office of the recorder of deeds of the

county or counties where the improvement is situated, prior to the commencement of work on such improvement, or within ten days after the execution of the principal contract, or not less than ten days prior to the contract of the subcontractor or materialman. * * *"

In other words, if the owner and the original contractor enter into a written agreement that the building shall be delivered free from all liens, the subcontractors and all others are denied the right of any lien, provided they either had actual notice of the waiver before they themselves contracted, or they had constructive notice by the filing of the waiver agreement in the public records not less than ten days prior to their contract with the principal contractor. The theory is that, if the subcontractor, after notice of the agreement to deliver the building free from all liens, still goes ahead and contracts with the contractor, this action indicates his assent to the agreement, and amounts to a waiver of his own right of lien.

PINNING et al. v. SKIPPER.

Court of Appeals of Maryland, 1889. 71 Md. 347, 18 A. 659.

MILLER, J. The mechanic's lien law provides that "no person having such lien shall be considered as waiving the same by granting a credit, or receiving notes or other securities unless the same be received as payment, or the lien be expressly waived." Code, art. 63, § 3. It is conceded that under this provision the lien may be waived by a special contract inconsistent with its existence or enforcement. Such a contract is, in effect, an express waiver of the lien. The lien claim in this case, amounting to $991.56, was filed by the appellants against 22 brick houses built on contiguous lots of which the appellee was the owner or reputed owner and builder. The itemized account is for sand used in laying the bricks, for digging the foundations and cellars, grading the yards and pavements, of these houses, and for grading under back buildings.

It appears from the record that these lots owned by the appellee, and on which he intended to build these and other houses, contained a large quantity of valuable sand, and on the 21st of July, 1887, before any of the work was begun, he and the appellants entered into a special written contract. By this contract the Pinnings agreed (1) to do all the excavation necessary for the erection of 89 houses, more or less, on these lots, to grade the yards and alleys in rear of the same, to grade Castle street from Chew street to the alley in the rear of the houses to be erected on Eager street, and to furnish so much good sharp sand as may be necessary for the brick-work and plastering these 89 houses at 45 cents per 1,000 bricks, said 45 cents to include the plastering sand; (2) to do all this work and furnish this sand for the privilege of removing and selling the surplus sand for their own use; * * * (6) they agree to give to Skipper a good lien bond as a bar against liens

upon said houses, or either of them, for work done or material furnished or for labor or hire; (7) to take a house or houses in full payment for the sand delivered as above mentioned; and should there be any balance due to Skipper they agree to pay the same to him. Skipper on his part agreed to give the Pinnings the surplus sand in consideration of their performance of the above work, and to give a good and sufficient deed of assignment to them for the house or houses above mentioned. At the same time the Pinnings gave to Skipper their bond, with a surety therein, to which a copy of this contract was attached, in the penalty of $1,000, conditioned for the faithful performance on their part of the terms and conditions of this contract.

There may be some difficulty as to the construction and effect of this contract in other respects, but we find none in determining that it is utterly inconsistent with the enforcement of a mechanic's lien against either of these houses by the appellants. The stipulation that they would give a bond "as a bar against liens upon said houses, or either of them," and the giving of the bond conditioned for the faithful performance of their part of the contract, clearly, in our judgment, constitute in law a waiver of the lien sought to be enforced in this suit. * * * If a party expressly contracts that he will not do a certain thing, or will not set up a certain claim against the other contracting party or his property by resort to a certain process, it seems to us a legal anomaly to say he can go on and do the thing. * * * In our opinion, therefore, the court below was right, in taking this case from the jury, and directing a verdict for the defendant by granting his first prayer.

Judgment affirmed.

SECTION 2.—IMPLIED WAIVER

WATERBURY LUMBER & COAL CO. v. ASTERCHINSKY.

Supreme Court of Errors of Connecticut, 1913. 87 Conn. 316, 87 A. 739, Ann. Cas. 1916B, 613.

RORABACK, J. In December, 1911, one Harry Gips was the owner of a certain piece of land situated on North Main street in Waterbury, upon which at that time stood a building. It appears that the land was a building lot 54 by 120 feet. On the 11th day of December, 1911, under an oral agreement made with Gips, the plaintiff began to furnish materials and render services in the construction of an addition to this building. This addition when finished formed a part of the building originally standing upon this land. The addition consisted of several rooms, three stores, and a veranda. The plaintiff ceased furnishing materials and rendering services on the 12th day of June, 1912. On the 22d day of July, 1912, and within 60 days from the date of ceasing to furnish materials and rendering services, the plaintiff

executed and filed a good and sufficient mechanic's lien upon these premises. This lien was duly recorded in the land records of Waterbury on the 22d day of July, 1912. On the 10th day of July, 1912, Gips conveyed these premises to the defendant by a deed recorded in the Waterbury land records. The plaintiff has never been paid for these materials and services thus furnished and rendered.

On May 21, 1912, Gips executed and delivered to the plaintiff his promissory note for $1,284.43, which note was accepted by the plaintiff and credited upon its books as a credit, in the same manner as credits for materials returned and cash paid. This note was discounted at the plaintiff's bank. No fixed time was ever agreed upon between Gips and the plaintiff for the payment of materials furnished and services rendered. The note was not paid at maturity, and Gips did not offer to renew the same, and no payment has at any time been made thereof. It was not agreed or understood between the plaintiff and Gips that this note was to be accepted in payment of the debt evidenced thereby. At the time of the acceptance of the note nothing was said by Gips or the plaintiff as to the plaintiff's right of lien upon the premises, and the plaintiff at all times relied upon the security of this lien and right of lien for the payment of the debt evidenced by the note. At no time did the plaintiff agree or contract to waive its statutory lien or right of lien upon these premises. The defendant did not inquire of the plaintiff as to whether or not the plaintiff had ever been paid for his materials and services, or whether the note had ever been paid. At the time the defendant obtained title to the premises she knew that the plaintiff had furnished these materials and rendered the services in question, and she also knew that this note had been executed. * * *

By the express provisions of the statute, section 4135, the lien of the plaintiff "took precedence of any other incumbrances originating after the commencement of such services, or the furnishing of any such materials." This date was December 11, 1911. The defendant did not obtain her deed until the 10th day of July, 1912, two days before the plaintiff ceased furnishing material and rendering services. The finding does not disclose a case for the application of the doctrine of estoppel. The plaintiff's lien attached to the property when it commenced to furnish materials and render services.

The defendant acquired title to the real estate when the plaintiff had substantially completed its work. The defendant knew that the plaintiff had been adding to the value of the real estate she was about to purchase by its labor and materials, and she was chargeable with notice that a lien might attach to this property for these improvements. Justice Story says: "Whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons) is in equity held to be good notice to bind him." Story's Equity Jurisprudence, vol. 1, c. 7, p. 401.

The defendant made no inquiry of the plaintiff to ascertain whether it intended to claim a lien for its labor and materials. There was no false representation made by the plaintiff to any one; there was no intention on its part to deceive. The court has distinctly found that

the plaintiff and the defendant at no time communicated upon the subject. The letters that the defendant read were merely communications passing between the plaintiff and a third party in reference to a business transaction, and did not purport to state facts upon which the defendant would be justified in relying. It does not appear that this property was sold to the defendant clear of the plaintiff's lien, and especially with its knowledge and acquiescence. On the contrary, it may be inferred from the finding that the plaintiff knew nothing of this transfer at the time or before it was made. Neither does it appear that the plaintiff performed any work or rendered any services after it had knowledge of this conveyance.

The defendant contends that the conduct of the plaintiff, as disclosed by the finding, constituted a waiver of its right of lien. It is urged that the plaintiff agreed upon a sufficient consideration to take the promissory note of Gips, without security, for his debt. This, it is said, formed a special contract which destroyed the plaintiff's right of lien. It appears from the finding that Gips executed and delivered to the plaintiff his note for $1,284.43, substantially the amount of its claim against Gips. This note was accepted and credited upon the books of the plaintiff as cash paid. This note was never paid. It was also found that it was not understood that this note was to be accepted in payment of the debt evidenced thereby, and that the plaintiff always intended to rely upon the security of this lien for the payment of this debt.

The question of waiver in this case is a question of intention to be determined by the trial court. The finding of the court is conclusive against the defendant upon this point. The plaintiff never expressly agreed to accept this note in discharge of its lien. The statute subjects this property to a lien for the payment of the plaintiff's debt. This debt has never been paid. The plaintiff's lien is therefore entitled to priority over the defendant's title. Hopkins v. Forrester, 39 Conn. 351, 354; Halsted & Harmount Co. v. Arick, 76 Conn. 382, 387, 56 A. 628.

There is no error. The other Judges concurred.

SECTION 3.—EFFECT OF BREACH BY OWNER ON CONTRACTOR'S WAIVER

KERTSCHER & CO. v. GREEN et al.

Court of Appeals of New York, 1912. 205 N. Y. 522, 99 N. E. 146, Ann. Cas. 1913E, 561.

CULLEN, C. J. The action was brought to foreclose a mechanic's lien. * * * The plaintiff contracted to perform the carpenter's and cabinet work and materials in the building to be erected for the defendant. By the written contract it was provided: "That the party

of the second part will not at any time suffer or permit any lien, attachment, or other incumbrance under any laws of this state or otherwise, by any person or persons whomsoever, to be put or remain on the building or premises, into or upon which any work is done or materials are furnished under this contract, for such work or materials, or by reason of any other claim or demand against the party of the second part, and that they will not put any materials on said building to which it has not obtained absolute title; and that any such lien, attachment or other incumbrance, or claim of a third party until it is removed, shall preclude any and all claim or demand for any payment whatever under or by virtue of this contract, and in the event that same is not removed, party of the first part may remove same at the expense, including legal fees, of the party of the second part." Payments were to be made on or before the 10th day of each month of 80 per cent. of the value of the work done in the preceding month. It was further provided that the final payment should not be made until there was filed with the superintendent or architect a certificate of the county clerk that no mechanic's lien had been filed against the owner for work or materials furnished under the contract and the certificate of the register that no conditional bill of sale had been filed by a third party for any material furnished on said property. After the completion of the work on October 26, 1907, the plaintiff filed a mechanic's lien for the amount due him under the contract, to foreclose which this action was brought.

The contention of the appellants is that the lien was invalid because by the contract the plaintiff, the contractor, had agreed not to file any lien. To this contention there are two answers. The trial court found that the defendants had failed to make the payment for the September work which became due under the contract on October 10th. Assuming that the contract between the parties is to be construed as contended by the plaintiff, the breach of the contract by the defendants by their default in making that payment relieved the plaintiff from the obligation upon its part, and it became entitled to file a lien for its work and materials. This proposition has recently been held by this court in the case of Greenfield v. Brody, 204 N. Y. 659, 97 N. E. 1105, decided without opinion. In that case the contract was for the construction of several houses, and the contractors were to be paid in part by the conveyance to them of two of the houses. The owner transferred the property, thus putting it beyond his power to comply with the contract. It was held this authorized a contractor to file and maintain a lien. In that case the plaintiffs, contractors, had expressly agreed that under no circumstances would they file or cause to be filed any mechanic's lien against the property. * * *

PROPERTY

CHAPTER 1

NATURE AND FORMS

SECTION 1.—IN GENERAL

Definition of Property.—In the broadest sense, the term "property" includes everything tangible or intangible, corporeal or incorporeal, movable or immovable, which is capable of exclusive possession, and which carries with it the right of use, enjoyment, and disposal. In a legal sense, property means the sum total of rights of ownership incident to the object, rather than the object itself. The rights of ownership are those already referred to, namely, the rights of exclusive possession, use, enjoyment, and disposal.

Real Property and Personal Property.—Rights of ownership incident to land and all that is permanently attached thereto are called "real property." Rights of ownership incident to chattels, or movables not attached to land, are called "personal property." For the purpose of clarity, in referring to the object, we shall use the words "real estate" or "chattel," according to whether it is land or movables; and for reference to the legal rights incident to the object, we shall reserve the word "property," real or personal as the case may be.

Chattels.—The body of legal principles governing the transfer of title to chattels forms the law of sales. The moment at which title passes, and the effect of warranties, express or implied, of the chattel sold, are there provided. It will be sufficient at this point to state simply that the requirements of transfer of title to a chattel are much less formal than in the case of real estate.

SECTION 2.—ESTATES IN REAL PROPERTY

In General.—Real property being the legal rights incident to land, it follows that the extent or number of these rights held by a person in respect to a particular piece of land measures the extent of his property therein. This extent of property or interest is called an estate.

Fee Simple Estate.—An estate in fee simple is the highest estate known to the law; it includes all of the legal rights incident to the land. The owner of an estate in fee simple is as nearly as it is possible to be an absolute owner. He may dispose of it by deed during his lifetime, or by will to take effect at his death. He may carve out of it certain less estates, as, for example, where he grants to another an easement or an estate for life or for years.

Estates for Life.—An estate for life is one that is vested in a person called a "life tenant," to continue during his lifetime, or for the life of another, at the end of which period it reverts to the owner of the fee, who is called the "remainderman." The owner of the life estate may convey away his whole estate, or grant less estates than his own. He may not commit waste; that is, he may not do any act which results in permanent or lasting injury to the land. For instance, a life tenant may not open mines or oil wells and exhaust the land of its mineral content, although, if the mine or well is already open at the time he comes into his estate, he may continue to take out the mineral.

Estates Arising out of Marriage—Dower.—Dower is the estate in land provided for the widow by law out of the husband's real estate. At common law the widow has, during her life, one-third of the lands of which her husband was seized during marriage. Dower has in many states been changed by statute to give the surviving wife one-third of her husband's lands in fee, and to give the husband a corresponding interest in her lands.

Estates Arising out of Marriage—Homestead.—By statute in many states, a new estate called homestead has been created consisting of a certain value in the family residence, usually one thousand dollars, which among other things is exempt from debt. The homestead estate may be lost by abandonment, or it may be conveyed by deed.

Joint Estates—Joint Tenancy and Tenancy in Common.—Where an estate is held by two persons jointly, each owns an undivided portion, and both are entitled to enjoy the land. Upon the death of one joint tenant, his share vests in the survivor. In a tenancy in common there is no rule of survivorship, and each may dispose of his one-half share by deed or by will. Everywhere joint tenancies are held to be

tenancies in common, unless the deed expressly states that the land is to be held in joint tenancy, and not in tenancy in common.

Easements.—Easements are real property, in that they consist of rights in land. The object of easements will be considered more fully under that head later on.

Estates for Years.—An estate for years is created by a contract called a "lease"; the one renting the land being called the "lessor" and the one to whom the land is rented being called the "lessee."

CHAPTER 2

TRANSFER OF TITLE TO REAL PROPERTY

SECTION 1.—TRANSFER OF TITLE BY DEED

In General.—Title is the means by which one acquires property in lands. The conveyance of title to real estate is a very technical procedure, all the details of which must be fully and exactly carried out; otherwise, the conveyance will be inoperative to pass the title.

A deed may be defined as a writing, signed, sealed, delivered, and acknowledged, by which the title to land is transferred from one party, called the "grantor," to another, called the "grantee."

There are two forms of deed commonly used, the quitclaim deed, and the warranty deed. A quitclaim deed purports to pass whatever property in the land the grantor has and no more. He may have no interest at all, but, whatever he has, he grants. The quitclaim deed is in general use for the purpose of clearing up clouds on the title or doubtful claims against real estate. A warranty deed is a deed of bargain and sale, containing the personal warranty of the grantor that he has a clear title.

Requisites of a Valid Deed.—In order that a deed be operative to convey title to real estate, it must comply with the following requirements:

(1) It must be in writing. Under the Statute of Frauds the conveyance of any interest in land is provable in court only by a writing.

(2) It must contain the names of the parties. If the grantor or grantee is not named in the deed with certainty, no title passes.

(3) It must recite a consideration. The consideration need not be adequate; it is very common that the recited consideration is one dollar.

(4) It must contain a granting clause. This clause contains the operative words of grant. These are most frequently "give, grant, bargain, and sell." The granting clause should also contain words of inheritance. "To A and his heirs forever" are the proper words to convey a fee to A.

(5) It must identify the land conveyed by descriptive words. If the description is so uncertain that it is impossible to ascertain what land was meant, the deed will be void for uncertainty.

(6) It must contain a relinquishment of dower and homestead. The

dower right of the wife in her husband's land cannot be relinquished without the consent of the wife. She may, however, convey her dower right simply by executing the deed or mortgage concurrently with her husband.

The homestead estate in the land sought to be conveyed passes by the deed signed both by husband and wife; but in many states the acknowledgment must expressly mention conveyance of homestead.

(7) The deed must be acknowledged before a notary. The form of acknowledgment is usually prescribed by statute. It consists usually in the mere statement of the grantor that he acknowledges the conveyance to be his free act and deed. The officer then certifies over his seal and signature that the deed was acknowledged before him.

(8) The deed must be delivered to the grantee. Until the grantor voluntarily delivers the deed, no title passes, and not even a bona fide purchaser from the grantee gets any title. But, once the deed is delivered, title has passed; and mere destruction of the deed, or its delivery back to the grantor, will not make him the owner again. It is the act coupled with the intention which operates to transfer the title; it is not possession of the instrument.

SECTION 2.—TRANSFER OF TITLE BY OPERATION OF LAW

1. Eminent Domain

Fee simple title is the largest possible interest a person can have in land, but even this is not absolute ownership. The rights of the public are paramount to those of the individual, and, where it is to the best interests of the public that land be taken for a public purpose, the fact that the land is already owned by an individual will not stand in the way. Upon proper application to the courts by an agency of the public in the proceeding known as eminent domain, upon payment to the owner of the value of his real estate, land may be taken from the individual owner, against his will and without his consent.

The public agencies having this power of eminent domain include the state, municipal corporations, railroads, public utilities, and most enterprises so far affected with a public interest as to be subject to state regulation.

2. Adverse Possession

Title by adverse possession is that title which a person acquires who is in possession of the lands of another person for a certain length of time and under certain conditions. The time in most states is twenty years. The conditions are that the claimant must have had adverse, actual, and visible, exclusive, continuous possession of the land for the twenty-year period under a claim of title.

Statutes of Limitation.—Most of the states have passed statutes of limitation relating to land titles, providing that after a specified period, usually twenty years, of adverse or wrongful possession the true owner may no longer advance any claim to ownership. The theory of this legislation is the necessity of security in land titles and the prevention of the making of illegal claims to land after the evidence necessary to defeat them has been lost. The owner of land, who, knowing that another is in wrongful possession, fails to assert his right for the twenty-year period, may properly be penalized by being precluded thereafter from asserting his right.

Presumption of Lost Grant.—Independent of a statute of limitations, a similar result is achieved as to transfer of title in adverse possession by the conclusive presumption of a valid conveyance to the adverse claimant after his twenty-year occupancy. It is immaterial that there was in fact no such conveyance. From the fact of adverse and hostile use of the land for twenty years, the law presumes a lost grant, and confirms the title in the adverse claimant. It is to be noted that under the statute of limitations the transfer of title is by way of penalty to the real owner, while under the presumption of a lost grant there is involved an inference of the making of a conveyance from the fact of possession and adverse use.

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3. Other Modes of Transfer by Operation of Law

Other cases in which an involuntary alienation or transfer of title takes place are:

(1) Where the lands of infants, insane, or other incompetent persons are sold for their benefit or protection.

(2) Where lands are sold to satisfy the claims of creditors under the execution of a judgment against the owner, or are conveyed under a decree of a court of equity by way of foreclosure of a mortgage or other lien thereon.

(3) Where one in whom legal title to land is vested dies intestate—that is, without leaving a will—the law operates to transfer title to his heirs.

CHAPTER 3

RIGHTS INCIDENT TO OWNERSHIP OF LAND

SECTION 1.—IN GENERAL

Importance of the Subject to the Engineer.—The first essential of any engineering or architectural project is the acquisition of the land for a site or right of way. It is of prime importance to the enterprise that the land selected for a site be free, not only from physical defects, such as may undermine and destroy the structure, but also free from defects in title, such as exist when rights of others are involved. Such latter considerations should be the concern of the engineer or architect, quite as much as the owner. The professional employee, with a knowledge of such questions, who performs his duties with reference thereto, will be valuable to his employer. Practically all operations in engineering and architectural construction have for their object utilization of rights in land. The precise nature of such rights is involved in the cases following. Our inquiry will include an examination into the rights of ownership of land and rights in the land of another.

Land.—In its legal sense, "land" includes the ground or soil of the earth, together with all things attached thereto, and is deemed to extend indefinitely upward and downward, *ad cœlum et ad infernos,* from the sky to the center of the earth. It includes all structures upon the land, and all minerals, oils, and gases beneath the surface.

Trespass.—The owner of land has legal rights in respect thereto against all others. The sum total of these rights is free and exclusive use and enjoyment. Interference therewith is trespass. Thus, where a person, without permission, enters upon the land of another, or tunnels under his land, or strings wires over his land, or builds a house with an eave projecting into the air over his land, any one of these acts is a breach of the duty owed by all other persons to the owner in respect to his land, for which the law will grant a remedy in damages, or which equity will restrain by injunction.

Other Incidents of Ownership.—Use and enjoyment of land includes many rights, both as to matters beneath and above the surface. The matter of vertical and lateral support is an essential right. The question of rights in running waters and streams often becomes involved. The rights of an owner of land in the air above his estate is an important question. In the sections following we shall examine some

of the decisions of the courts of last resort which define the limits of these rights. In general, it may be said that an owner's rights to use and enjoyment of his land are limited only by the conflicting rights of use and enjoyment of other owners.

SECTION 2.—SUPPORT

FOLEY v. WYETH.

Supreme Judicial Court of Massachusetts, 1861. 2 Allen, 131, 79 Am. Dec. 771.

[This was an action for damages for breach of duty of lateral support. Plaintiff owned a piece of land adjacent to land owned by the defendant, and it appeared that the defendant in making an excavation on her own land caused a considerable portion of the land of the plaintiff to cave in and to be removed.] Proof of the alleged excavation and injury to his land * * * having been adduced by the plaintiff, the presiding judge ruled that this was sufficient to entitle him to maintain his action, and that for this purpose it was not incumbent on him to show also that the excavation was made by the defendant in a careless, negligent, and unskilful manner.

MERRICK, J. * * * [The ruling of the trial judge was correct.] If the owner of land makes an excavation in it so near to the adjoining land of another proprietor that the soil of the latter breaks away and falls into the pit, he is responsible for all the damage thereby occasioned. Few principles of the law can be traced to an earlier or to a more constant recognition, through a long series of uniform and consistent decisions, than this. * * * "The right to support from the adjoining soil may be claimed * * * in respect of the land in its natural state. * * * The right is not an easement, but is a right of property as being necessarily and naturally attached to the soil." * * * And in the recent case of Humphries v. Brogden, 12 Ad. & El. N. S. 739, where the law upon the subject appears to have been fully and carefully investigated and considered, it is affirmed that the right to lateral support from the adjoining soil is not like the support of one building upon another, supposed to be gained by grant, but is a right of property which passes with the soil, so that if the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the support of the other close the very instant when the conveyance is executed. "And this doctrine," said Lord Campbell, C. J., after an examination of the authorities in which it is recognized and by which it is sustained, "stands on natural justice, and is essential to the protection and enjoyment of property in the soil." * * * It is a necessary consequence from this principle that, for any injury to his soil resulting from the removal of the natural support to which

it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskilfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it.

The jury were therefore correctly advised that, if the defendant, by excavations in her own land, and by carrying away large quantities of earth and clay therefrom, caused the adjoining land to fall and sink into the pit which she had dug, she was liable for the injury done to the soil of the plaintiff, and that this action might be maintained to recover damages for the interruption and disturbance of his right of way in the passageways, as well as for depriving him, or lessening the value, of the use of the land to which they were appurtenant. But it was erroneous, in the absence of any proof of carelessness, negligence or unskilfulness in the execution of the work, to add that they might take into consideration as an element of damage for which compensation could be recovered, the fact that the foundation of his house had been made to crack and settle. * * *

[Judgment for plaintiff.]

GILDERSLEEVE v. HAMMOND et al.

Supreme Court of Michigan, 1896. 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46.

Plaintiff and defendants were the owners of adjoining lots in Battle Creek, situated in the business part of the city. Plaintiff had, several years ago, erected a building upon her lot, the lower part of which was occupied as a store by a tenant, and the upper portion by other tenants. Plaintiff had no cellar underneath her building, and it stood upon a stone wall sunk into the earth to a depth of from 20 to 24 inches, and from 12 to 18 inches above the surface, and built sufficiently strong to support the structure above it, which was a balloon frame veneered with brick. It had stood there in safety for several years. It was built 4½ feet from the division line between their lots. Defendants' lot was at that time vacant. In 1893 the defendants, desiring to erect a building upon their lot, with a cellar underneath, proceeded to excavate for that purpose to the depth of between 7 and 8 feet, close to the line. The soil was sandy and gravelly, with little adhesive power, and, as the excavation went down, plaintiff's soil caved into the excavation. Defendants took no steps to prevent the soil from caving in, or to protect plaintiff's building. They excavated the whole length of the building, permitting the soil to cave in, according to its natural

tendency. It had fallen away from underneath the foundation wall. In consequence of this the foundation under plaintiff's building was undermined, and a portion of the side of the building fell out, causing considerable damage. The defendants were cognizant of the danger. So, also, was the plaintiff, whose evidence supported the claim that defendants promised to protect her building. This is an action upon the case, to recover damages for injury. * * *

GRANT, J. (after stating the facts). The precise questions involved appear not to have been decided by this court. The questions are: (1) What rights does a landowner possess, in excavating close to his neighbor's line? (2) What duty does he owe to his neighbor, and what means, if any, must he take to protect the soil of his neighbor and prevent it from caving in? (3) Under what circumstances, if any, is such landowner responsible for damages to the superstructure erected on his neighbor's lot?

The defendants' positions are thus summarized: (1) Plaintiff's building was in a business part of the city. She was therefore bound to know that improvements would be made upon the adjoining vacant lot, and was bound, in law, to so construct her building as to allow such improvements to be made in the ordinary way. (2) They admit that plaintiff was entitled to the natural right of lateral support for her land from the adjoining land, and, if her land fell in consequence of such excavation, she had an action against the defendants, although the excavating was not done carelessly or unskillfully. (3) This natural right does not extend to the artificial structures placed upon the land, and, if the plaintiff erected her house on or near the verge of her land, she had no natural right of lateral support for the building.

Plaintiff bases her claim upon the familiar legal maxim, "Sic utere tuo ut alienum non lædas," insisting that this maxim applies to the case where one may, by the exercise of ordinary care and prudence, so use his own as not to cause injury to another. The court instructed the jury as follows: "The adjacent owner may excavate his own land for such lawful purposes as he sees fit, provided he digs with ordinary care; and if in so doing the earth gives way, and a house upon the adjacent land falls by reason of the additional weight placed upon the natural soil, he is without remedy, provided the adjacent owner used ordinary skill, care, and diligence in digging the excavation, and has used reasonable means to protect the adjacent lands and buildings from falling into the excavation." This was the groundwork of the charge, and we need not state it more fully.

The defendants' first proposition is undoubtedly a correct statement of the law. Chancellor Walworth, in Lasala v. Holbrook, 4 Paige, 169, thus states the rule: "I cannot deprive him [my neighbor] of this right by erecting a building on my lot, the weight of which will cause my land to fall into his pit, which he may dig in the proper and legitimate exercise of his previous right to improve his own lot." Non sequitur that the excavator may dig his pit so close to his neighbor's line that his adjacent land will fall into it, and, as it falls, draw it away, and continue this process until several feet in width have caved

off, and undermined a building several feet from the line. Clearly it was not, in this case, the pressure of the building upon the adjacent land that caused the soil to cave. The soil would have caved in, had there been no building. The caving process began almost simultaneously with the digging. Had the soil been sufficiently adhesive to leave a perpendicular surface as the excavation was made, the building would not have caused it to fall. At least, there is no evidence that it would. Therefore the pressure of the soil did not cause the soil to cave in, but the removal of the plaintiff's soil, between the division line and his foundation wall, caused the building to fall. The distinction between the two cases, and the principles governing them, is apparent.

The defendants' second position is conceded to be the law. It is also the well-established rule that a superstructure is not entitled to the lateral support of the adjoining land, and that a landowner may remove such support for all legitimate purposes. * * * In order to maintain an action for injury to the adjoining land in consequence of an excavation made by the adjacent owner, no negligence is necessary. Every man is entitled to the enjoyment of his land in its natural state, and any removal of it by excavating the adjoining land is a wrong, per se, for which the law gives damages. It would seems to follow naturally that in such excavations the landowner is bound to the exercise of some degree of care to prevent the soil from caving in. If the soil is adhesive, so that it will remain in its natural position with the lateral support removed, obviously the excavator may excavate as deep as he pleases—even close to the boundary line. If in such case his neighbor's land caves in by reason of the pressure of the superstructure upon it, it is damnum absque injuria. But is this true of a sandy, gravelly soil? Most of the authorities above cited recognize the duty of the excavator to use reasonable care in the performance of his work.

Washburn says, at the page above cited, "such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or negligently." * * * So, in Washb. Easm., at page 582, the editor thus states the principle: "If the owner of the adjoining land takes away the natural support, it does not matter whether he acts with due care and is guilty of no negligence. On the other hand, this natural right of support does not extend to buildings or other additional weights superimposed upon the land, unless, either by express grant or by their existence on the land for a prescriptive period, they have gained an easement of support from the adjacent land. Until they have so acquired that right, the owner of the adjoining land may cut or dig it away as he chooses, provided he does not carelessly or wantonly deprive his neighbor of the support to his buildings; or, in other words, if the owner of the adjoining land makes an excavation of such a nature that by it the adjoining land would, in its natural state, be caused to fall, without the additional weight of buildings upon it, he is liable, whether negligent or not. If the excavation is such that the adjoining soil would not have fallen, had it not been weighted by the buildings upon it, he is not liable, unless he made the excavation carelessly, negligently, or wantonly."

Undoubtedly the courts often find difficulty in determining whether the superstructure did or did not cause the soil to cave in, but in this case we think there is no such difficulty. Plaintiff had erected a lawful building. She had placed the foundation wall 4½ feet from the line. It is established by the evidence, and is also a matter of common knowledge, that the caving of the soil might have been avoided by either excavating and building the wall in sections, or by planking to keep the soil in place, as is usually done in excavating to put in sewers and water pipes in similar soil. * * *

Broadly and fairly stated, the defendants' contention is this: They had the right to excavate to the depth of 7 or 8 feet in this sandy and gravelly soil, the entire 52 feet, without any effort to prevent the plaintiff's soil from caving in, to draw it away as it fell until it had fallen to a distance of from 4½ to 5 feet from the boundary line and reached directly under her foundation wall, and that this was an excavation in the usual manner, and with ordinary care. The proposition does not commend itself to our judgment, nor does it seem to us to be based upon sound reason, common sense, and common honesty, which are the foundation of the common law. Nor do we think that the authorities sustain the proposition. On the contrary, we think that such conduct is negligence per se, bordering upon recklessness. It is established by the evidence that the caving of the soil could have been prevented by the defendants at an expense of from $15 to $25. In Larson v. Railway Co. [110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. Rep. 439] the excavator had notified his neighbor that he should excavate and build his wall in sections. Instead of doing this, he excavated nearly the entire distance in a soil similar to that of the plaintiff, and was held responsible for injury to the building.

Our conclusion as to the law of this and similar cases is: (1) While a landowner has the undoubted right to excavate close to the boundary line, he must take reasonable precautions to prevent his neighbor's soil from falling. (2) If he has taken such reasonable precautions, and yet the soil falls from its own pressure, he is still liable for injury to the land, but not for any injury to the superstructures. (3) If the pressure of the superstructure causes the land to fall, he is not liable either for injury to the land or superstructure. (4) If he fails to take such reasonable precautions to protect his neighbor's soil, and to preserve it in its natural state, he is liable for the injury to both the land and the superstructure, if the pressure of the superstructure did not cause the land to fall, and it fell in consequence of the failure to take such reasonable precautions.

It is, however, insisted by the defendants that the plaintiff was guilty of contributory negligence, in not shoring up and protecting her own property when she saw the imminent danger. Under her evidence, the defendants informed her that they would protect her building, and this would relieve her from any further responsibility. * * *

Judgment for plaintiff.[1]

[1] The dissenting opinion of Hooker, J., is omitted.

SECTION 3.—RIGHTS IN STREAMS AND WATERCOURSES

WOODIN v. WENTWORTH et al.

Supreme Court of Michigan, 1885. 57 Mich. 278, 23 N. W. 813.

SHERWOOD, J. It appears from the record in this case, that, during the year 1882, the plaintiff was in possession of, and used, and had for many years previous thereto, two mills in the township of Shermain, in Isabella county. These mills were run by water power upon Chippewa river. One was a gristmill and the other a sawmill, and stood side by side, and were joined together, and located about nine miles below the junction of the north and south branches of the Chippewa, which constitute the main stream. The defendants at the same time possessed and controlled a dam known as the "Hudson Dam," and banking ground for logs below the dam, where they were deposited in large quantities by defendants; and this dam was used by them for the purpose of flooding the logs away from the banking ground, and running them to the jam below. The dam was 16 miles, by the current of the stream, above the mills of the plaintiff, and located on the south branch. The plaintiff brought this suit against defendants for unlawfully holding back and diverting the waters of the river in the south branch, thereby preventing him from using his mills. The plaintiff in his declaration particularly sets out the wrong complained of, and alleges that he was thereby deprived of the use of his mills and the profits thereof which he would have made if the waters of the Chippewa had not been diverted.

The defendants pleaded the general issue. The case was tried before a jury, and upon the trial the plaintiff introduced testimony tending to show that after the middle of June of each year logs could not be driven on the south branch of the Chippewa river without the use of floods, and that the defendants drove the logs so deposited by them on the banking ground above referred to by the use of floods from the Hudson dam, and that the waters of the south branch were held back by means of the dam, and that floods were let off from the dam at intervals during the season of 1882, commencing in the latter part of June and lasting up to the first of December; that by this use of the water the water was retained from the mills of plaintiff and let off in such a way that the plaintiff was deprived of the use of his mills during the season from the latter part of June to the first of December; that during this time the plaintiff was so deprived of the use of the sawmill entirely, and of the full use of the gristmill a portion of the time, and that the irregular manner in which the defendants let off the water was the cause of the failure of the mill to be operated during those times. * * *

For the purposes of this suit we must regard the testimony offered sufficient prima facie evidence that each party was the owner of the

premises he occupied and used upon the stream. The record shows these parties proprietors on the same stream, and as such each has a right to a fair and reasonable participation in the use of its waters. This right the law will always protect, and, when violated, will furnish the proper means of redress. This right is common to all proprietors, and an injury to one, which is incident to the reasonable enjoyment of the common right by another, is not actionable. It is only the unreasonable use, detention, or diversion of the water that is actionable. * * *

Upon the first question above stated the circuit judge held and charged the jury: "The plaintiff had the right to have the water of the south branch of the Chippewa river flow into and through his pond in its usual and ordinary mode of flowing, and any detention of the water by defendants, for the sole purpose of securing a flood, in such a manner that it could not be used by plaintiff in the running of his mills, was unreasonable and unlawful as to plaintiff, and entitles him to compensation for the resulting damages. If you find from the evidence that by reason of defendants' holding back the water by means of the dam, that plaintiff was thereby prevented from obtaining a sufficient supply with which to operate his mills, he is entitled to recover such damages as he has suffered by reason of being deprived of the use of his mills." We think these charges are not subject to the exceptions taken, but that the rule laid down is within the former decisions made by this court, and particularly the last case above cited, which is very much like the present in its facts. We find no occasion for modifying the views therein presented in any respect.

Upon the second question, the circuit judge charged the jury: "The measure of damages is such sum as the use of the mills was worth to the plaintiff during the time in the summer and fall of 1882 as plaintiff was unable to use them by reason of the water being held back. If the jury find for plaintiff they will award him such sum or damages as they find from the evidence that the use of the sawmill was worth to plaintiff between July 1, 1882, and December 12, 1882, if you find from the evidence that he was unable to run or use his sawmill between those dates solely on account of defendants' holding the water back; and also such sum as they may find from the evidence that plaintiff has lost by reason of not being able to run the gristmill to its full capacity between those dates, by reason of defendants' holding the water back." The law upon the subject of damages thus stated was applicable to the facts as claimed by the plaintiff, and entirely proper upon the theory of the case.

[The judgment for the plaintiff upon the verdict must be affirmed.]

MENG v. COFFEY et al.

Supreme Court of Nebraska, 1903. 67 Neb. 500, 93 N. W. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

POUND, C. This suit was brought in 1893 to enjoin the defendants, upper riparian owners upon Hat creek and its several tributaries, from diverting the waters of said streams for irrigation purposes to such extent as to deprive the plaintiff, a lower owner, of the use of the stream. Upon trial a decision was announced orally adverse to the plaintiff. On appeal to this court it appeared that no final decree had been entered in accordance with such announcement, and the appeal failed. Thereafter a decree dismissing the cause and following the findings originally announced was duly entered, from which the present appeal is prosecuted.

The defendants justify their diversions of the waters of said streams upon these grounds: (1) Prior appropriation; (2) that irrigation of meadow land to produce forage for their stock is a "domestic" use of the water, for which, if necessary, they may consume the whole. * * *

The first two positions are clearly untenable if this court is to adhere to its repeated pronouncements that the rules of the common law as to the rights and duties of riparian owners are in force in this state. * * * In a brief in which the subject is most elaborately and exhaustively discussed, counsel say: "No riparian proprietor in Nebraska to-day is entitled to the full flow of the stream through his premises just for the pleasure it may give him to see the stream filling its banks. * * * The use of the water belongs to the people." And throughout that brief, and in all the arguments we have examined, it is assumed that at common law any taking of water from a stream is an injury to the riparian proprietor, and that the latter may insist that no water whatever shall go out. The common law does not hold to so unreasonable a rule. On the contrary, it considers running water publici juris, and, while it will not permit any one man to monopolize all the water of a running stream when there are other riparian owners who need and may use it also, neither does it grant to any riparian owner an absolute right to insist that every drop of the water flow past his land exactly as it would in a state of nature. * * *

When, therefore, counsel tell us that their clients have a natural right to irrigate, and that reasonable use of the water is necessary in exercise of that right, they urge nothing against the rules of the common law, since the latter merely insist that others along the streams in question have the same natural right, and permit every reasonable use by each consistent with like use by all. The apparent modifications of the common-law rules in the semiarid or arid states in that courts of such states are more liberal in their construction of what is a reasonable use, are no departure from the principles on which the rules are founded. On the contrary, they carry them to their logical conclusion in view of the special conditions of such regions. * * *

For the reasons indicated, we are of opinion that the former hold-

ings of the court must be adhered to, and that, except as altered by statutes, the common-law rules are in force in every part of the state. The details of such rules with respect to irrigation, however, and their application to irrigation in the semiarid portions of the state, have not, as yet, received careful consideration by this court. It is generally recognized that at common law a riparian owner may take water from a stream for purposes of irrigation. * * * At an early day there was a tendency to class irrigation among those uses of a stream which might be carried even to entire consumption of its waters. But another view has long prevailed, and is now well established, not only in the eastern portion of the country, but even in the arid and semiarid states (so far as such states recognize the common-law doctrine as to riparian rights), to the effect that irrigation is one of those uses which must be exercised reasonably with due regard to the rights of others. * * *

It would doubtless be impolitic to give an arbitrary or hard and fast meaning to the word "reasonable" in this connection. The use of water for irrigation always involves some loss, and we do not think it would be wise to declare every perceptible diminution of the waters of a stream to be unreasonable. The necessity of a liberal view of what constitutes a reasonable use of water for irrigation has been judicially recognized, * * * and we think caution in that respect entirely proper. If the rights of the upper owner in the water are no more than those of the lower owner, they are at the same time no less. His right to reasonable use of the water for irrigation ought not to be rendered nugatory by requiring it to be exercised in an impossible manner. * * *

The uses which an upper riparian owner may make of a stream for purposes of irrigation must be judged, in determining whether they are reasonable, with reference to the size, situation, and character of the stream, the uses to which its waters may be put by other riparian owners, the season of the year, and the nature of the region. These circumstances differ in different cases, and what use is reasonable must be largely a question of fact in each case. * * * Some things, however, are clearly unreasonable, and it may be laid down absolutely that the upper owner, in using the water for irrigation, must not waste, needlessly diminish, or wholly consume it, to the injury of other owners, nor so as to prevent reasonable use of it by them also. * * *

Judged in this way, we think the use made of the streams in question by three of the defendants may not be said to be reasonable. Hat creek is a small stream, about 10 feet wide where it passes the plaintiff's lands, formed by the junction of a number of similar streams a few miles above. Of these, Warbonnet creek, after gathering several small tributaries, flows into Munroe creek, which is received by Sowbelly creek, and the latter soon joins Hat creek, into which, some distance above, a number of smaller streams have been united. All of these creeks are fed by springs in the hills, and flow the year round, although at times somewhat reduced in volume in dry weather. * * *

The defendant Brewster maintains a dam on Warbonnet creek, and a ditch, by means of which he irrigates some 300 acres. The capacity

of this ditch is sufficient to contain the entire stream. It takes the water away from the creek to a point about a mile off, where the dip is but very slightly toward the creek, and there discharges it, so that practically all that is not used in irrigation will, in hot weather, evaporate, and not return to the creek. On one occasion, when the season was very dry in that vicinity, and a number of Mr. Brewster's neighbors below him were complaining because they could get no water, it appears that he was turning the water upon a meadow of 80 to 100 acres, so that it stood there from one to one and one-half inches deep; and, as we have seen, what was not used was substantially wasted. This is obviously unreasonable. The defendant Wilcox maintains a ditch on Munroe creek, with which he irrigates 150 acres. This ditch also is sufficient to carry the whole stream, and the water is so discharged that none gets back into the creek, since the ground slopes in another direction at the point of discharge. With respect to the defendant Coffey, who maintains a ditch on Hat creek, with which he irrigates 160 acres, the case is not so clear. But at the time the writs were served in this case, while there was an abundance of water in his ditch, the sheriff found the creek dry a mile and a half below, and the bed of the creek opposite the plaintiff was so dry that dust blew in it. * * *

PER CURIAM. For the reasons set forth in the foregoing opinion, the decree of the district court is affirmed as to the defendant Steele, but reversed as to the defendants Coffey, Brewster, and Wilcox, with directions to make new and further findings of fact in conformity with said opinion, and to enter a decree enjoining the defendant Wilcox from wasting or unreasonably diminishing the waters of Munroe creek, and enjoining the defendants Brewster and Coffey from consuming all the waters of Warbonnet and Hat creeks, respectively, in the irrigation of their lands, or permanently diverting in any year a greater proportion of the water in such streams for the time being than they were accustomed to take out prior to 1893, having regard to the nature of the season and the condition of the stream at the time; that proportion and other questions of fact necessary to the rendition of such decree to be ascertained from the evidence already taken, or by taking further evidence at the discretion of the district court.

GARWOOD v. NEW YORK CENT. & H. R. R. CO.

Court of Appeals of New York, 1881. 83 N. Y. 400, 38 Am. Rep. 452.

Action by the owner of a gristmill, operated by the waters of Tonawanda creek, in Batavia, Genesee county, to restrain the defendant from diverting the water above the plaintiff's mill, to tanks and reservoirs constructed by the defendant to supply its locomotive engines with water, and to recover damage for such diversion. * * *

DANFORTH, J. * * * The law is well settled that each riparian owner has a right to the ordinary use of water flowing past his

land, that is, ad lavandum et ad potandum, for domestic purposes and his cattle, although some portion may be thereby exhausted; and this is so, without regard to the effect which such use may have upon the lower owner. The water may also be used for irrigation or for manufacturing purposes. The cases cited by the appellant are abundant to show this, but in every one the irrigation is of the land to which the right to use the water is an incident, or with which the manufacturing purpose is connected, but even this privilege cannot be exercised if thereby the lawful use of the water by a lower proprietor is interfered with to his injury. Miner v. Gilmour, 12 Moore, 156; Tyler v. Wilkinson, 4 Mason, 397. Now in the case before us the defendant has done something more; it has not been content with exercising this privilege; it has diverted a considerable portion of the stream not for any use upon the land past which it flows, but for the transaction of its business in other places and for purposes in no respect pertaining to the land itself. The pipes and reservoirs of the defendant are not laid or constructed for the mere purpose of detaining the water a short time, or applying it to machinery or other object upon the land itself, and afterward restoring it, but for facility in filling the defendant's locomotives, in order that they, with power generated from it, may pass as the interest of the defendant may require, to the east or west, returning no portion of it, even in the form of vapor, to the stream from which it was taken. So far as the plaintiff is concerned, it has carried away from his premises the water as effectually as if it had been turned into another channel and discharged at Albany or Buffalo; and from this, as the jury has found, he has sustained damage.

[The case, therefore, presents no exception to the rule that a riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for any purpose, to the prejudice of any other riparian owner. The injunction should be made permanent.]

SECTION 4.—AIR

MADISON et al. v. DUCKTOWN SULPHUR, COPPER & IRON CO., Limited.

McGHEE et al. v. TENNESSEE COPPER CO. et al.

FARNER v. TENNESSEE COPPER CO.

Supreme Court of Tennessee, 1904. 113 Tenn. 331, 83 S. W. 658.

[This was a bill for injunction, filed by complainants, who are the owners of small farms situated in the mountains around Ducktown, against the defendant, a large copper smelter. The bill is based on the ground of nuisance, in that the defendant, in the course of reducing

copper ore causes large volumes of smoke to issue from their roast piles, which smoke descends upon the surrounding lands, and injures trees and crops, and renders the homes of the complainants less comfortable and their lands less profitable than before. It appeared from the evidence that the complainants have occupied their present homes for more than twenty years, and that the nuisance now complained of has been continuing for the past ten years, during which time the defendant copper company has made huge investment in plant and property, all of which will be lost to them should this injunction issue.]

NEIL, J. The general effect produced by the smoke upon the possessions and families of the complainants is as follows, viz.:

Their timber and crop interests have been badly injured, and they have been annoyed and discommoded by the smoke so that the complainants are prevented from using and enjoying their farms and homes as they did prior to the inauguration of these enterprises. The smoke makes it impossible for the owners of farms within the area of the smoke zone to subsist their families thereon with the degree of comfort they enjoyed before. They cannot raise and harvest their customary crops, and their timber is largely destroyed. * * *

It is found, in substance, that, if the injunctive relief sought be granted, the defendants will be compelled to stop operations, and their property will become practically worthless, the immense business conducted by them will cease, and they will be compelled to withdraw from the state. It is a necessary deduction from the foregoing that a great and increasing industry in the state will be destroyed, and all of the valuable copper properties of the state become worthless. * * *

While there can be no doubt that the facts stated make out a case of nuisance, for which the complainants in actions at law would be entitled to recover damages (Swain v. Ducktown Sulphur, Copper & Iron Co. [Tennessee Copper Co.] supra [111 Tenn. 430, 78 S. W. 93]) yet the remedy in equity is not a matter of course (Parker v. Winnipiseogee, etc., Lake Co., 2 Black [U. S.] 545, 17 L. Ed. 333). * * *

And the equitable remedy by injunction must be applied for with reasonable promptness. There must be no laches. * * * In Graham v. Burkenhead, etc., Ry. Co. [48 Eng. Ch. Rep. 114], a delay of eighteen months was held sufficient, there having been expenditures made by the defendant in the meantime. In Birmingham Canal Co. v. Lloyd [18 Ves. 515] a delay of two years was held sufficient, there having been an expenditure of £10,000 by the defendant in that time. In Cooper v. Hubbuck [30 Beav. 160, 166, 167] and Weller v. Smeaton [1 Cox, Cases in Eq. 102] it appears there was a simple delay of three years. In Clifton Iron Co. v. Dye [87 Ala. 468, 471, 472, 6 So. 192] a delay of three years, and, as to part of the works, two years, was held sufficient to estop; expensive improvements having been made in the meantime. In Whitney v. Union Ry. Co. [11 Gray (Mass.) 359, 71 Am. Dec. 715] there was a delay of four years, with improvements made in the meantime. In Goodall v. Crofton [33 Ohio St. 271, 31 Am. Rep. 535] there was a delay of ten years, with improvements made in

the interim by the defendant. In Bassett v. Company [47 N. H. 438–441] a delay of seven or eight years was held sufficient to estop the complainant, the defendant during that period having expended large sums in extending its works. In Caldwell v. Knott [10 Yerg. 210, 212] and in Stamps v. Hartford [M. S.] a simple delay of ten years was held sufficient laches to bar equitable relief.

Upon laches appearing, a court of equity will be justified in withholding relief and leaving the party to his rights at law. "A party may by laches," says Wood, "deprive himself of an equitable remedy against a nuisance. Thus if a party sleeps on his rights and allows a nuisance to go on without remonstrance, or rather without taking measures either by suit at law or in equity to protect his rights, and allows the party to go on making large expenditures about the business which constitutes the nuisance, he will be regarded as guilty of such laches as to deprive him of equitable relief, particularly until the right is first settled at law. And when the delay is also coupled with an acquiescence he will be deprived of all equitable relief, and may be placed in a position where the court will enjoin him from proceeding against the nuisance at law, or even to prevent the recovery of a judgment obtained therefor in a court of law." Wood, Nuis. § 804. * * *

We are of opinion that the complainants are estopped to claim equitable relief against the defendant * * * by their laches. It is clear * * * that these complainants had been suffering the injuries now complained of for ten years when the bill was filed, without making any complaint of them in any forum. In the meantime the defendant had expended several hundred thousand dollars in making improvements in the plant, and the nature and source of the injury were such that the complainants could not be mistaken as to the cause or extent of it. Under such circumstances, we are of the opinion that it would be inequitable to grant the severe remedy of injunction, but that the said complainants should be left to their actions for damages. * * *

A judgment for damages in this class of cases is a matter of absolute right, where injury is shown. A decree for an injunction is a matter of sound legal discretion, to be granted or withheld as that discretion shall dictate, after a full and careful consideration of every element appertaining to the injury. * * * Shall the complainants be granted, in the way of damages, the full measure of relief to which their injuries entitle them, or shall we go further, and grant their request to blot out two great mining and manufacturing enterprises, destroy half of the taxable values of a county, and drive more than 10,000 people from their homes? We think there can be no doubt as to what the true answer to this question should be.

In order to protect by injunction several small tracts of land, aggregating in value less than $1,000, we are asked to destroy other property worth nearly $2,000,000, and wreck two great mining and manufacturing enterprises, that are engaged in work of very great importance, not only to their owners, but to the state, and to the whole country as well, to depopulate a large town, and deprive thousands of working people of their homes and livelihood, and scatter them broadcast.

The result would be practically a confiscation of the property of the defendants for the benefit of the complainants—an appropriation without compensation. The defendants cannot reduce their ores in a manner different from that they are now employing, and there is no more remote place to which they can remove. The decree asked for would deprive them of all of their rights.

We appreciate the argument based on the fact that the homes of the complainants who live on the small tracts of land referred to are not so comfortable and useful to their owners as they were before they were affected by the smoke complained of, and we are deeply sensible of the truth of the proposition that no man is entitled to any more rights than another on the ground that he has or owns more property than that other. But in a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances. We see no escape from the conclusion in the present case that the only proper decree is to allow the complainants a reference for the ascertainment of damages, and that the injunction must be denied to them.
* * *

BOSTON FERRULE CO. v. HILLS et al.

Supreme Judicial Court of Massachusetts, 1893. 159 Mass. 147, 34 N. E. 85, 20 L. R. A. 844.

[This is a bill for injunction by the occupant of one floor of a manufacturing building against the occupants of the floor above. The bill alleges that in carrying on its manufactures the defendants use large quantities of sand and acids, and that they allow said sand and acids to sift and come through holes, cracks, and crannies in the flooring, and fall upon the premises occupied by the complainant, to the very great damage of the machinery, materials, and goods manufactured; particles of sand getting in said machinery and injuring it, and the acids and fumes of acids corroding said machinery, materials, and goods.]

HOLMES, J. The fair interpretation of the plaintiff's bill is that the floor above its rooms naturally and properly has holes in it, and that the defendants knowingly carry on their business in such a way as to send fumes of acids and large quantities of sand through these holes upon the plaintiff's premises, and thereby to corrode and spoil its machinery and goods.

As between adjoining proprietors, one of them has no right as against the others to do what is complained of here, and it would be no answer to an action to say that the plaintiff might have shut his windows. There would be no need to allege in terms that the business was unsuitable to be carried on in that place, or that there was negligence in the mode of carrying it on. As the damage was a manifest conse-

quence of the defendants' business, the fact that he could not help it if he carried on that business would be immaterial. * * *

The only justification that could be urged would be that the interests of adjoining owners necessarily conflict; that they are both intrinsically meritorious; that the law has to adjust them by drawing a quasi physical line; and that the damage complained of was on the right side of that line, and must be put up with by the plaintiff,—as was held, for instance, in Middlesex Co. v. McCue, 149 Mass. 103, 21 N. E. 230; Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768. But, if the allegations in regard to the injury were fully proved, there can be no question that this defense would not prevail. The discharge of acid fumes upon neighboring land in sufficient quantities to do substantial harm is deemed so clearly beyond the limit of reasonable use of a man's premises that courts have held as matter of law that it is actionable. * * * This may be subject to the question of the uses to which the land in the neighborhood is adapted, but that question is not before us at this stage. * * *

If there are any special reasons why the defendants should be allowed to do what they do, they should be alleged in the answer. The question before us is whether there is a general right to invade lower premises with acid fumes and sand in the mode described in a manufacturing building, if the aggressor finds it necessary for his business. We are not prepared to admit the existence of such a right.

Demurrer overruled.

CHAPTER 4

RIGHTS IN ANOTHER'S LAND—EASEMENTS

SECTION 1.—GENERAL PRINCIPLES OF EASEMENTS

Easement Defined.—An easement is a right which one proprietor of land has to a benefit or beneficial use in the land of another. Rights and interests acquired in another's land include rights of way, rights to water, support, air, light, view, and many similar interests appurtenant to the enjoyment of land. An easement does not involve an active duty upon the owner of the land subject to the easement, his duty being merely the passive one of not interfering with the class of acts within the rights of the holder of the easement.

Relation to the Engineering Profession.—The subject of easements is of vital importance to the public utility, to the railroad, to the business of electric power transmission, to the builder, to the architect, and to the engineer. The construction and operation of every project involves the acquisition of land and the assumption of the burdens incident thereto. "Injuries and resulting damages are a certain consequence of every engineering work, and a successful engineer must know what constitutes actionable injuries, and must, if possible, avoid them. The direct injuries to abutting property are usually apparent to a cautious and observing engineer, and may be guarded against; but there are other injuries none the less troublesome and frequently more fatal to the rapid progress and completion of works. They are injuries to incorporeal rights, invisible, unrecorded, unobserved, that suddenly issue from obscurity in the shape of an exorbitant and extortionate demand, or of a threatened injunction on account of some unthought-of injury. A knowledge of these rights and prevention of their infringement would reasonably be expected of the engineer or architect more than from an attorney, who frequently ends his labors with an exhausting search of paper titles in the registry office. The engineer's or architect's experience enables him to anticipate future complications which must result from installation and operation of works, and to secure to the project privileges and rights, the lack of which may be the subject of expensive litigation."[1]

[1] Waite, Law of Operations Preliminary to Construction, p. 460.

Easements Distinguished from Other Rights.—Natural rights, such as the right of an owner of land to the natural flow and reasonable or proportional use of water, air, and support, such as were dealt with in the preceding chapter, are not, as are easements, primarily rights in another's land, but are corporeal rights incident to the ownership of one's own land.

An easement is to be distinguished from a *profit à prendre,* which involves a power in one person to sever and remove from another's land something existing in or growing on the soil.

An easement is to be distinguished from a mere license, or terminable privilege, the chief characteristic of which is its revocability. The existence of an easement cannot be terminated without the consent of the holder, any more than can any other right.

Easements Appurtenant and in Gross.—An easement ordinarily exists for the benefit of the owner of some particular piece of land, as an incident to the more complete enjoyment of his land. It pertains to the land, not to the person. Thus the owner's right over the servient tenement, or the land of the other, is not personal to him, but is an incident of his ownership of his own land, termed the "dominant tenement." Thus there can be no easement without a distinct dominant tenement. The right or easement runs with the land to which it is appurtenant, and it passes by a deed of conveyance to the grantee.

An easement in gross, on the other hand, is a right personal to the holder, quite apart from his ownership of particular land. There is no dominant tenement to which the right is appurtenant. In such case the burden rests on one piece of land in favor of a person or individual; the principal distinction between an easement proper—that is, an easement appurtenant—and a right in gross being found in the fact that in the first there is, and in the second there is not, a dominant tenement.

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1. Is an Easement in Gross Assignable?

BOATMAN et ux. v. LASLEY.

Supreme Court of Ohio, 1873. 23 Ohio St. 614.

[This was an action for the purchase price of real estate sold by plaintiff, Lasley, to the defendant. The defendant pleads a set-off or counterclaim against the plaintiff, alleging damages for a breach of plaintiff's warranty against incumbrances. The alleged incumbrance consisted of a private right of way over the warranted premises in one Alexander Logue, a right outstanding at the date of the conveyance. This right of way had been granted by deed, to "Logue, his heirs and assigns, and the tenants or occupiers for the time being of the lands

owned and occupied by the said Alexander Logue, in section 15, town 5, in the Ohio Company's Purchase."

[Plaintiff denies the existence of any easement as an incumbrance, on the ground that before the date of plaintiff's sale and covenant to defendant said Logue had conveyed all of his said lands in section 15 to one George W. Roush. Further, defendant fails to make any allegation that Logue, at the time the right of way over the warranted premises was granted to him by the plaintiff, was the owner or occupier of any land in said section 15, or elsewhere, nor is it alleged that the right of way complained of became appurtenant to any land whatever, or that said Roush had any interest in said right of way. Plaintiff therefore argues, that since Logue owned no land to which the easement of way was appurtenant, it was an easement in gross personal in Logue, not assignable to Logue's grantee, and therefore no encumbrance on the land granted by plaintiff to defendant.]

McIlvaine, J. Is a private right of way over the lands of another, in gross, such an interest or estate in land, as may be cast by descent, or may be assigned by the grantee to one who has no interest in the land? These are the only questions in this case. If such a right be inheritable or assignable, defendant's right to damages for breach of covenant against incumbrances is clear.

Defendant strongly insists, in argument, that a right of way in gross may be conveyed to the grantee "and to his heirs and assigns forever," because an owner in fee may carve out of his estate any interest less than the whole and dispose of the less estate absolutely; and this because the power to dispose of the whole estate includes a power to dispose of any part of it.

This argument assumes the affirmative of the very question in controversy, to wit, that such a right of way is an interest or estate in the land.

A mere naked right to pass and repass over the land of another, a use which excludes all participation in the profits of the land, is not, in any proper sense, an interest or estate in the land itself. Such a right is in its nature personal; it attaches itself to the person of him to whom it is granted, and must die with the person.

If such right be an inheritable estate, how will the heirs take? In severalty, in joint tenancy, coparcenary, or as tenants in common? If not in severalty, how can their interests be severed?

If it be assignable, what limit can be placed on the power of alienation? To whom and to how many may it be transferred? Why not to the public at large, and thus convert into a public way that which was intended to be a private and exclusive way only?

Where the way is appendant or appurtenant to other lands, very different considerations arise. There the right attaches to the lands to which the way is appurtenant, because it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case the right of way passes with the dominant estate as an incident thereto. A right of way appendant cannot be con-

verted into a way in gross, nor can a way in gross be turned into a way appendant.

A very marked distinction also exists between a way in gross and an easement of profit à prendre, such as the right to enter upon the lands of another, and remove gravel or other materials therefrom. The latter so far partakes of the nature of an estate in the land itself, as to be treated as an inheritable and assignable interest. Post v. Pearsall, 22 Wend. (N. Y.) 432.

Both upon principle and authority, we think there was no error in the charge of the court below. Mr. Washburn in his work on Easements, p. 8, par. 11, states the law upon this subject as follows: "A man may have a way in gross over another's land, but it must, from its nature, be a personal right, not assignable or inheritable; nor can it be made so by any terms in the grant, any more than a collateral and independent contract can be made to run with the land." * * *

[Judgment for plaintiff.]

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2. Necessity for Existence of a Dominant Tenement

GRAHAM v. WALKER et al.

Supreme Court of Errors of Connecticut. 1905. 78 Conn. 130, 61 A. 98, 2 L. R. A. (N. S.) 983, 112 Am. St. Rep. 93, 3 Ann. Cas. 641.

[Action by Graham against Walker and others for trespassing on the plaintiff's lands. Defendant denies that his going across plaintiff's land constitutes a trespass, alleging that he has an easement of way across the said land on two grounds: (1) An easement appurtenant to land of defendant, and (2) an easement of way in gross belonging by immemorial custom to all the inhabitants of Blissville. Judgment was for plaintiff below.]

Baldwin, J. The answer contained three separate defenses—a general denial; an entry in the exercise of a prescriptive right of way to and from Taftville, appurtenant to a close of the defendants situated in a quarter of the town of Lisbon known as "Blissville"; and an entry in the exercise of a right of way to and from Taftville, belonging by immemorial local custom to all the inhabitants of Blissville. It was admitted that the land over which the way was alleged to exist was bounded by a highway, on the opposite side of which, at a distance of about half a mile, the defendants owned a house and farm, which was the close to which they claimed the way to be appurtenant. The defendants introduced evidence which, as they claimed, proved the existence of each of the rights of way set up in their answer—the former by a continuous, uninterrupted, and adverse user for more than 15 years by them and their predecessors in title in connection with the occupation, use, and enjoyment of their close, and the latter by a like user for more than 15 years by all the landowners and inhabitants of Blissville generally, and their tenants and employés.

With respect to the third defense, the jury were instructed that if

a substantial portion of the inhabitants of Blissville for an entire period of at least 15 years had uninterruptedly, continuously, adversely, and under a claim of right in behalf of all the inhabitants, passed over the land in question, to and from Taftville, with the knowledge of the owner of the land, a right of way in favor of all the inhabitants was thereby acquired, founded on custom, which attached to every one who for the time being was such an inhabitant, while he continued to be such; that, if such a user was open, notorious, and visible, the owner of the land was charged with notice of it; that a user would be continuous and uninterrupted, if it were substantially such, although it were more or less frequent, according to the nature of the way and the occurrence of occasions for traveling over it; and that certain testimony which had been introduced by the plaintiff as to the existence of other paths and their use by the inhabitants in going to and from Taftville tended in a measure to show that their use of the way claimed was not continuous, uninterrupted, and customary. These instructions are made a ground of appeal by the defendants. They were too favorable to the defense. A right of way by custom in favor of the inhabitants of a particular locality might be set up by the common law of England. It could be proved by immemorial usage. From such proof a presumption was deemed to arise that the usage was founded on a legal right. This right was not assumed to arise from a grant by an owner of land of an easement in it. No grant of that nature can subject the tenement of the grantor to an easement which will outlast the life of the grantee, unless it be made in such a way as to become appurtenant to some other tenement.

A right of way by custom appertains to a certain district of territory, but not to any particular tenement forming part of that territory. Nor is it confined to owners of land within that territory. It belongs to the inhabitants of that territory, whether landowners or not. To a fluctuating body of that kind no estate in lands can be granted. If, therefore, an easement be claimed to exist in their favor, a title cannot be made out by prescription, on the theory of a lost grant. It must have come, if at all, from some public act of a governmental nature. The theory of English law was that, if there had been a usage from time immemorial (that is, so far as could be ascertained, from the coronation of Richard I), affecting the use of real estate by those not able to show any paper title to warrant it, it might fairly be presumed that it arose under an act of Parliament or other public act of governing power, the best evidence of which had perished. A charter from some feudal lord or ecclesiastical corporation might be such an act. Of such charters there were no public records. That the accidental destruction of the parchment on which one was written should annul the privileges which it gave would be plainly unjust. The political and legal institutions of Connecticut have from the first differed in essential particulars from those of England. Feudalism never existed here. There were no manors or manorial rights. A recording system was early set up, and has been consistently maintained, calculated to put on paper, for perpetual preservation and public knowledge, the

sources of all titles to or incumbrances affecting real estate. * * * In view of all the considerations named, we are of opinion that such rules of the English common law as gave them sanction were unadapted to the conditions of political society existing here, and have never been in force in Connecticut. * * *

The trial court further instructed the jury particularly with regard to the second defense, that there had been no evidence that the use of the way by the defendants or their predecessors in title had any connection with the defendants' land, nor any direct relation to its use and enjoyment, since it differed in no respect from the use of the way by their neighbors, and therefore that no way appurtenant to their close had been made out. In this there was error. An easement may be appurtenant to land although the servient tenement is separated by other lands from the dominant tenement. A right to the enjoyment of a pew in the parish church could at common law be claimed by prescription, as appurtenant to a messuage in any part of the parish. Stocks v. Booth, 1 T. R. 428. A right to convey water from a distant source of supply may be appurtenant to a tenement separated from that on which such source of supply is situated by several intervening parcels of land, each belonging to a different proprietor. Cady v. Springsville Waterworks Co., 134 N. Y. 118, 31 N. E. 245. In like manner, a way from one close to and through another is none the less appurtenant to the former if it run over the intervening lands of numerous proprietors. Guthrie v. Canadian Pacific Railway Co., 27 Ont. App. 64, 69; Horner v. Keene, 177 Ill. 390, 52 N. E. 492. * * *

The use, however, of any easement, which can be claimed as an appurtenance by prescription, must be so related to the use of the dominant tenement that its particular connection with the beneficial enjoyment of that tenement is not merely conjectural, but direct and apparent. A claim to a way by prescription appurtenant to a particular close being founded on the presumption of a lost grant, none can be so gained unless the prescriptive use was such as to make it reasonable to presume that the owner of the land over which the way was used knew that such use was in connection with and furtherance of the enjoyment of such close. He might be willing to concede a claim to a personal right of way which would cease with the life of the claimant, when he would dispute a claim to a right of way appurtenant to another's close, which would endure forever.

The fact that the respective closes of the parties were half a mile apart, and that the way was only accessible by the highway on which each of these closes abutted, did not conclusively bar a claim that the way was an appurtenance to that of the defendants. The testimony which they had introduced tended to show a long, adverse, and continuous user by the successive owners of their close, in connection with their use, occupation, and enjoyment of it in going thence to Taftville and back. Such a user, if proved to the satisfaction of the jury, might sufficiently establish a direct connection between the use of the close and the use of the way to bring it within the definition of a way appurtenant. That some or all of their neighbors might have a similar

way, appurtenant to their closes, was immaterial. Kent v. Waite, 10 Pick. [Mass.] 138.

Other reasons of appeal require no discussion, as the questions presented are not likely to recur on another trial.

There is error, and a new trial is ordered. The other Judges concurred.[2]

STANDARD OIL CO. v. BUCHI et ux.

Court of Chancery of New Jersey, 1907. 72 N. J. Eq. 492, 66 A. 427.

[Bill for injunction to restrain defendant from forcibly interfering with the complainant's work in laying across the lands of defendant a line of pipe for the transportation of oil. It appears that one James H. Kingsland secured from the defendant by deed a right of way across defendant's land for the laying of a pipe line, and that said Kingsland conveyed his rights in this right of way to the Standard Oil Company, plaintiff herein. That deed, or so much of it as is necessary for present purposes, is as follows: "Witnesseth: That for and in consideration of five dollars in hand paid, the receipt of which is hereby acknowledged and the further sum of twenty dollars to be paid before any pipe is laid, the party of the first part, his heirs and assigns, hereby grants to the party of the second part, his heirs and assigns, the right of way to lay pipes for the transportation of petroleum, and operate the same on, over and through his lands in said county of Bergen, in said state of New Jersey."]

PITNEY, Advisory Master. * * * [The justification set up by the defendant for his interference with the work is as follows:] That the grant contained in the Kingsland deed amounted to no more than the grant of an easement without the naming of any dominant tenement, and therefor amounted to no more than an easement in gross, which was not assignable, and hence amounted to a mere license, and was determinable at the will of the licensor; that the license was in law immediately abandoned by the assignment thereof, and that it was also formally determined by a notice of revocation given by the defendant Buchi to the complainant, dated March 5, 1907, and annexed to the bill of complaint.

The first inquiry naturally is: What is the true character of the grant in question? Is it properly classified either as a mere easement or as a mere revocable license? It is to be observed, in the first place, that it is an instrument under seal, and expresses to be for a valuable consider-

[2] From the decision in the above case it is apparent that an easement of way of an electric power transmission line, or of a railroad, may be an easement appurtenant. Land owned and occupied by the company at one end of the line as a power station may be considered the dominant tenement, to which all other tracts of land traversed by the line, and so burdened with the easement of way, are servient. Thus an easement in a particular piece of land may be appurtenant to another, though separated from the latter by hundreds of miles of intervening distance.

ation presently paid, with the provision for the ascertainment of a further consideration in a mode, the reasonableness of which seems to me to be quite apparent and which has not been attacked in the argument. In the next place, it is not a mere promise to do something in the future, nor is it a mere permission, but it is a grant in præsenti, and it is not a mere privilege given to the grantee which can be considered as merely personal to him, such as a privilege to wander over ground with or without the privilege of hunting or fishing, but it is made to the grantee, his heirs and assigns. Then it is not the mere privilege to walk or pass over land without the right to disturb the soil, as is a right of way, but it is a "right to lay down pipes for the transportation of petroleum and to operate the same over" the lands, "together with all the right and privileges incident and necessary to the enjoyment of the grant and the removal of the pipes." This grants rights in the soil in perpetuo.

[Defendant's whole contention is placed upon the bold] bare ground that, because there was no dominant tenement mentioned in the grant to which what would have been an easement was appurtenant or appendant, the easement so called became one in gross and not assignable, and by its attempted assignment ceased to exist in law, or at least degenerated into a mere license revocable so far as not acted upon. Now, is it possible to treat the document in question as having no greater force than that? The doctrine contended for, if logically applied, leads to this result: If Mr. Barbour had paid Mr. Kingsland $1,000 in cash for this grant, and had the next day assigned it to the complainant, it would have been possible for Kingsland to have immediately destroyed the value in the law of his grant by a formal revocation of it, and the complainant would have had no relief in equity by showing that Barbour was acting merely as its agent. * * *

The idea underlying the ordinary easement is that it is at the expense of one tenement, called the "servient" tenement, and for the benefit especially of another tenement, called the "dominant" tenement. Clearly the right granted by the deed in this case was not of that character, and hence it must be construed by rules not applicable to those of ordinary easements. There was in this case, and could in the nature of things be, no dominant tenement. Nor is it, in its essential nature a license, nor can it be reduced in its nature in that respect. It by its terms granted a permanent right to lay the pipe, to maintain the same, and to remove the same. It gave an interest in the land quite as positive and as permanent as that in which a deed is given granting the right to lay a line of water pipes or to erect a line of telephone poles across the grantor's land, where the circumstances indicate that the work done thereunder was to be permanent. From these considerations, based on general and familiar principles, I come to the conclusion that the defendant's position is untenable, especially when urged in a court of equity. * * *

I think the present grant is something more than an easement, although undoubtedly it includes easements, and I think that it is a great deal more than a license, in that it gives an irrevocable interest in the

land and creates, by apt words, an estate, is expressed to be upon a consideration, and is sealed by the seal of the grantor. I can find no authority in any of the treatises or in any of the adjudged cases for holding that it is revocable.

As in my judgment the right of the complainant is entirely clear and not subject to revocation, I think it is entitled to relief by way of immediate injunction. * * *

SECTION 2.—CREATION OF EASEMENTS

1. By Express Grant

Any easement may be created by express grant. Such easement may be created by a reservation in the conveyance of the servient estate in favor of the grantor, the reservation operating as a grant of the easement. Thus an easement of way, for example, in favor of land A may be secured over land B, either (1) by written deed from the owner of B; or (2) where the owner of A also owns B and conveys B but reserves a way appurtenant to A. So, also, the individual owners of two adjoining buildings having a common skylight may by mutual covenants each secure an easement of light and air in so much of such skylight as is situated upon the lot of the other.

Since an easement is an interest in land, if created by an oral contract it is void under the statute of frauds. Therefore it is essential that the grant be in writing. In general, it may be said that the grant of an easement must contain all the formal requisites of a grant of land.

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2. By Implied Grant

THOMAS v. McCOY et al.

Appellate Court of Indiana, 1911. 48 Ind. App. 403, 96 N. E. 14.

[This is a prayer for a decree to confirm a way of necessity across defendant's land. The bill shows that plaintiff is the owner of a piece of land which is entirely surrounded by the land of other persons, that it is one quarter of a mile from any public highway, without a road or way leading to such highway, that the most direct outlet for plaintiff's land to a public highway is east across the adjoining land of defendant abutting on a highway, and that plaintiff in writing requested defendant to mark out a way over his land for plaintiff's use, which was refused, and that later plaintiff located, marked out, and described a way one rod wide along the south side of defendant's land, and notified defendant of his action in that regard; that defendant refused and still refuses to permit plaintiff to pass over his land to and from plaintiff's own land to said highway.

[As basis for plaintiff's claim to an easement of way over the land of defendant, plaintiff shows that on September 14, 1883, one Leander Small was the owner both of the tract of land now owned by plaintiff and that owned by defendant; that on the said day Small conveyed to plaintiff the parcel now owned by him, retaining the tract which he later conveyed to the defendant.]

MYERS, J. * * * The facts exhibited by the complaint * * * show that appellant's deed from Small and McIntyre by operation of law carried with it an implied grant of a way as of necessity to a public highway over the land retained by them. * * * As was said in the case of Logan v. Stogsdale (1890) 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58: "The theory is that, where land is sold that has no outlet, the vendor grants one over the parcel of which he retains the ownership."

[Defendant occupies the position of Small, plaintiff's grantor, and as the law implied a grant at the time Small conveyed to plaintiff, and as that grant was prior to Small's grant to defendant, said defendant must carry into effect his predecessor's implied grant. It follows that since plaintiff is the holder of an implied easement of way of necessity over defendant's land, he should be confirmed in said way by decree.

[Judgment for plaintiff.]

DUDGEON v. BRONSON et al.

Supreme Court of Indiana, 1902. 159 Ind. 562, 64 N. E. 910, 95 Am. St. Rep. 315.

[Suit by Mary C. Bronson for a way of necessity over lands owned by defendant.]

DOWLING, C. J. * * * The complaint shows that in 1875 one Stone owned two tracts of land in Allen county, one of which contained 160 acres, and the other 40 acres. Stone sold the larger tract in 1875 to one Benninghoff, and in the same year conveyed the smaller to the appellee Mary C. Bronson. The 160-acre tract bordered upon a highway, but the 40-acre tract had no outlet. The appellant is a remote grantee of Benninghoff. The successive owners of the larger tract have recognized the right of the appellee to a way over the same to the public highway, and such way is in use by the appellee, but, on account of the character of the location of the said way, which is low and wet for a large part of the year, and the nature of the soil, which is soft, the appellee cannot pass over the said way without inconvenience and difficulty. In its present condition, the said way is useless to the appellee for ingress and egress to and from her land, and an additional strip 4 feet in width, running the whole length of said way, is required to render said way passable and useful. The appellant refused to let the appellee use such additional strip, and has forbidden her to enter upon the same. The relief prayed for is that the width of the way be fixed at 20 feet.

The case stated in the complaint is one in which the appellee was originally entitled to a way of necessity. Stone owned both the outer and larger tract bordering on the highway, and the inner and smaller one, which had no outlet. If the smaller tract was first sold, the right of access to the highway over the lands of the grantor was appurtenant to the grant. If the larger was first sold, then a way of necessity was impliedly reserved by the grantor for the benefit of the 40-acre tract. But it appears from the complaint that, after the conveyance of the two tracts by Stone, a way 16 feet in width was granted to and accepted and used by the appellee, and that she still continues to use it. She does not allege that she has no outlet from her land to the public highway, but says that the way (which we must presume was agreed upon between the appellee and the appellant, or his grantors) has become wet and inconvenient, and therefore useless. Having accepted a way of a certain width, and over a particular part of the lands owned by the party holding the servient estate, the appellee has no right to change it, but must be confined to the way thus selected. The grounds of the complaint are mere matters of inconvenience. That the way once selected and agreed upon is too steep or too narrow or too wet does not entitle the appellee to demand a new way, or to increase the width or change the direction of the old one. The right of way from necessity over the land of another is always of strict necessity, and nothing short of this will create the right. * * *

[Judgment for defendant.]

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3. Creation of Easement by Prescription

In General.—So far we have considered two methods by which easements, or rights in another's land, may be acquired or created, namely, by express grant, and by a grant implied in fact from the conduct of the parties. As a third method, easements may be acquired by a grant implied in law, which is called "prescription."

Definition.—Prescription consists of an adverse user of the property of another for a certain period of time, usually the same as that required to give title to land itself by adverse possession. The reason the law implies a grant from such adverse user is that public policy requires certitude in land titles. The theories upon which the doctrine of prescription is based are (1) the analogy of the statute of limitations as applicable to ownership of land; and (2) the presumption of a lost grant raised by the adverse use.

Requisites.—In order to acquire an easement by prescription the claimant must prove that during the full time of the prescriptive period, ordinarily twenty years, he has exercised an adverse, open, visible, and uninterrupted use in another's land. From such uninterrupted use the law will imply an actual right. But in order that such right of using

another's land be acquired, the user must have been such as to give rise to a right of action on the part of the owner, since, if he cannot legally protect himself against the user, no inference can be drawn from his failure to do so.

PARKS v. BISHOP.

Supreme Judicial Court of Massachusetts, 1876. 120 Mass. 340, 21 Am. Rep. 519.

[This was a bill for injunction to restrain defendant from passing over land belonging to plaintiff. The defendant alleged in his answer that he had acquired a right of way over said land by adverse use.]

GRAY, C. J. * * * When a right of way to certain land exists by adverse use and enjoyment only, although evidence of the exercise of the right for a single purpose will not prove a right of way for other purposes, yet proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate while substantially in the same condition. Ballard v. Dyson, 1 Taunt. 279; Cowling v. Higginson, 4 M. & W. 245; Dare v. Heathcote, 25 L. J. (N. S.) Exch. 245; Williams v. James, L. R. 2 C. P. 577; Sloan v. Holliday, 30 L. T. (N. S.) 757. But if the condition and character of the dominant estate are substantially altered—as in the case of a way to carry off wood from wild land, which is afterwards cultivated and built upon; or of a way for agricultural purposes, to a farm, which is afterwards turned into a manufactory or divided into building lots—the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate. Atwater v. Bodfish, 11 Gray, 150; Willes, J., in L. R. 2 C. P. 582; Wimbledon Commons v. Dixon, 1 Ch. D. 362.

In the present case, the report states that for more than twenty years Lakin had, in the shop abutting upon the passageway in question, a steam engine, which was driven by boilers in the larger building on the lot behind, and was used for operating the machinery in that building, the three stories of which were respectively occupied for a blacksmith's shop, a carriage shop, and a paint shop; that there was a door in the wall between the two buildings, which was constantly used for the purpose of passing between them through the engine room and over the passageway; that the space in the passageway was occasionally used for the purpose of setting tires upon wheels, in connection with the work in the shop; that all the coal for use under the boilers was brought in through the passageway, and deposited in the basement or cellar under the engineroom, until used in the regular course of business; and that the way was used generally as a back entrance or thoroughfare, as convenience required, in connection with the shops occupied by Lakin, without question or objection, for more than twenty years.

These facts appear to the court to justify and require the conclusion that Lakin had acquired by prescription a right of way for all purposes reasonably necessary for a manufactory upon the two lots, and which, upon the buildings being destroyed by fire and rebuilt for a manufactory and storehouse, he was entitled to use for the purpose of bringing goods into the smaller building abutting upon the passageway, to be thence hoisted up into the larger building, for storage and use therein; and that there has been no substantial alteration in the condition or character of the dominant estate, and no change, except in degree, in the exercise of the easement, and that for this reason the defendant has not exceeded his rights in the use of the passageway.

Bill dismissed.

SECTION 3.—EASEMENTS IN STRUCTURES

1. Party Walls

BOWHAY v. RICHARDS et al.

Supreme Court of Nebraska, 1908. 81 Neb. 764, 116 N. W. 677, 19 L. R. A. (N. S.) 883.

Calkins, C. In 1894 one Fouke was the owner of lot No. 2 in the town of Liberty, upon which there was a one-story brick building. The south wall of this building practically coincided with the south line of the lot. Fouke on October 17, 1894, made a contract with one Gifford that the latter might join this wall with a good and substantial brick or stone building on the south side of the building owned by Fouke. It was stipulated in this agreement that the floor joists should not be attached to the wall on lot 2, but that it might be used to support the roof or ceiling joists. This contract contained the following clause: "It is fully understood that so long as the present wall stands it may be used by said Gifford as a party wall, and in the event of the falling or breaking down of the said wall at any time, and in the event that a wall should be rebuilt where the present wall stands, then said Gifford shall have the right to join said wall, and it shall become a party wall as is the one for which this contract is made." It appears that Gifford was the owner of lot numbered 3, which adjoined lot numbered 2 on the south; but neither the ownership of this lot by Gifford nor its location was in any manner referred to in the written contract. Soon after the making of this contract Gifford erected a building, using the south wall as stipulated. The contract was never recorded. Both buildings were destroyed by fire in March, 1906, leaving standing, however, a portion of the wall in question.

On the 2d day of May, 1906, the plaintiff purchased lot 2, and afterwards erected a building thereon, in the construction of which he rebuilt and used the wall in question. After the completion of said wall and building on lot 2 by plaintiff the defendant, who had purchased lot 3, began the construction of a building thereon, and sought to use

the south wall for the support of the ceiling and roof joists of such building. The plaintiff thereupon brought this action, alleging sole ownership of lot 2, and asking that defendant be restrained from interfering with or using the south wall of the building. To this petition the defendant answered, alleging ownership of lot 3, adverse possession of the wall, the making of the written contract, the assignment of the same to the defendant, and that the plaintiff bought said lot 2 with full knowledge of the existence of said written contract. There was a reply denying these allegations of the answer, and alleging the destruction of the building by fire and the consequent termination of any easement in the wall by the defendants or their grantors. * * *

Where a party will is situated on both sides of the division line, each party has title to the soil to the line; but his title is qualified by the easement which the other owner has of supporting his building by the common wall. Where, as in this case, the wall is entirely upon the property of one party, the right of the other to have support therefrom is in the nature of an easement only; and the general doctrine is that such easement ceases upon the destruction of the building by fire. * * *

In this case the written contract provides: "And in the event of the falling or breaking down of said wall at any time, and in the event that a wall should be rebuilt where the present wall stands, then the said Gifford shall have the right to join said wall, and it shall become a party wall as is the one for which this contract is made." This presents the question whether the plaintiff in purchasing said property was chargeable with notice of the terms and conditions of this contract. There is no dispute as to the facts. There is no evidence to overcome the assertion of the plaintiff that he had no knowledge of the existence of any written contract. On the other hand, it is equally clear that the plaintiff knew of the use made by defendants' grantors before the fire of the wall in question. We think it may be conceded that notice to the plaintiff that the defendants' grantors used a portion of such wall for the support of his building charged the plaintiff with knowledge of the existence of an easement in the wall to that extent; but we doubt the soundness and justice of the doctrine that he was thereby put upon inquiry. It is the policy of the law to require parties claiming interests in real estate by virtue of written instruments to record the same, and thereby give notice of the extent and character of their claims. The place to inquire concerning titles or interest in the title of real estate is the office of the register of deeds for the county in which the same is situated. * * *

A person claiming an interest in realty by virtue of a written instrument can give notice to all the world of the extent of his claim by the registry of such instrument. Intending purchasers are entitled to notice given in this manner, and should not be bound to inquire for nor accept the statements of a person who refuses or neglects to record the written instrument under which he claims. When the plaintiff purchased this property, neither the defendant nor his grantor was making any actual use of the easement which they claimed in said wall. The only ease-

ment of the use of which the plaintiff had any notice was such as would, as we have seen, be terminated by the destruction of the buildings by fire; and it had not been exercised since the occurrence of the fire. It is plain that the actual use of an easement which is relied upon to take the place of the registration of the contract under which it is claimed must be an existing and continuous use. In any view of the case, we do not think the plaintiff was chargeable with notice of that clause in the contract which it is contended takes it out of the usual rule that an easement ends with the destruction of the property by fire. * * *

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

PUTZEL v. DROVERS' & MECHANICS' NAT. BANK.

Court of Appeals of Maryland, 1894. 78 Md. 349, 28 A. 276, 22 L. R. A. 632, 44 Am. St. Rep. 298.

BRYAN, J. Selig G. Putzel filed a bill in equity against the Drovers' & Mechanics' Bank of Baltimore. It was alleged that the defendant, without right or justification, was about to tear down the rear wall of the complainant's dwelling house, and thereby render it untenantable, and do him irreparable damage. The bill prayed an injunction to restrain the defendant from proceeding as alleged, and it was accordingly granted before answer. * * *

Putzel, the complainant, is the owner of a leasehold interest for 99 years, renewable forever, in a lot of ground in the city of Baltimore, on the west side of Eutaw street, between Fayette and Lexington streets. He acquired this property in the year 1866. For many years before his purchase, and ever since then, there has been on this lot a substantial brick dwelling house, which extended back to its westernmost boundary. The Drovers' & Mechanics' Bank, in the year 1888, became the owner of a leasehold interest in a lot of ground fronting on Fayette street, and running back northerly to Marion street, and binding, for a portion of its easterly line, on the westernmost boundary of Putzel's lot. It is not distinctly stated in the record, but this leasehold interest is evidently for 99 years, renewable forever. The bank's lot and Putzel's lot are separated by a division brick wall, which, by the measurements proved in the case, is shown to be built partly on the ground of one of these parties, and partly on the ground of the other. This wall has been standing for a very long time, certainly for more than 30 years before the transactions which are the subject of complaint in this case.

As far as we can ascertain from the testimony, Putzel's house, as originally built, had this division wall as its rear wall, but the rear wall was not built higher than the top of the division wall. In 1870, Putzel put an additional story on the back building, placing its rear wall on the top of the division wall. This division wall was used by the owners and occupants of the lot now owned by the bank for the purpose of designating the boundary line between it and the Putzel lot. There was evi-

dence of the use of it, also, for a series of years, as a support for the frame of a grape arbor. The bank, in the year 1892, commenced the erection of a large six-story building for the purposes of its business, and in the prosecution of the work proposed to take down the entire wall separating the two lots, and erect on the same line another wall of sufficient strength and thickness to support the new building, not encroaching on Putzel's lot, and offering to give him the benefit of the new wall as a partition wall for the benefit of any building to be erected on his lot. The question in the case is whether this action on the part of the bank would be a legitimate exercise of its rights of property.

No one seems to know when the wall in question was built. In all probability, the time was beyond the limit of living memory. There is some reason to think so from the fact that the deeds which created the leasehold interests in these lots were executed towards the close of the last century, and early in the beginning of the present. It seems to have been erected for the purpose of making the boundary between the lots, and to have been always used for that purpose. The soil of the respective owners was covered by it: [Although land covered by a party wall remains the several property of the owner of each half, yet the title of each owner is qualified to the easement to which the other is entitled.]

He [Putzel] had used this wall for more than 20 years as a support to his house; the enjoyment of it for this purpose had been notorious, peaceable, uninterrupted, and "as of right." Under these circumstances, the law considers that he had a prescriptive title to the use of it in the manner in which he had enjoyed it. It is conducive to the peace of society that claims of right which for a long time have been acquiesced in and regarded as settled should be protected by the law, and the space of 20 years has been adopted as the period for ripening claims of this description into titles. Putzel used this division wall as the rear wall of the lower part of his house, and also used it as a support for the wall of an additional story. To the extent of such use his title is clearly established. * * * The bank retained all its rights in the division wall which are not inconsistent with the enjoyment of the easement. It was bound to permit it to be used as a support for Putzel's house in the accustomed manner; but this is the limit of its obligation. It would be unreasonable to deny to it the right to improve its own property according to its interests and inclinations, provided it did not infringe the rights of other persons. In fact, the wall which it proposed to take down was insufficient to support the building which it desired to erect. If this should be taken down, and another larger and stronger one built in its stead, it would thereby exercise its own legitimate rights of property; and, if it gave to the adjoining house the same right of support in the new wall which it had in the old one, it would not injure its neighbor. This seems to us the just settlement of this controversy. Putzel may be put to some inconvenience while the building is going on, but this is one of the unavoidable consequences of living in a closely-built city. * * *

For the reasons which we have stated, we approve of the dissolution of the injunction, and to that extent the decree below will be affirmed. But the right to take down the wall is not absolute and unconditional; it is qualified in the manner which we have explained in a previous part of this opinion. The bank is bound to finish the division wall at its own expense, and to allow to Putzel's house the same right of support which it had in the old wall, and to indemnify him for the necessary expenses which he has incurred, and may incur, in protecting his property from the consequences of the removal of the old wall. * * *

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2. Support of Buildings

In General.—As previously stated, the owner of land in its natural state, unburdened by the pressure of a building, has a right of lateral support against owners of adjacent land. This is a "natural right." It is, however, limited to the amount of support required to maintain only the land itself. The right to additional support sufficient to maintain the superadded weight of a building is an easement, which, to be held, must be acquired.

Acquisition of Easement of Support.—An easement of support for a building can only be acquired by an express or implied grant. It cannot be acquired by prescription. Where two adjacent lots, requiring mutual support and burdened with buildings, are conveyed to different owners, a right of support of land and building passes by the conveyance to each grantee, unless excluded by the terms of the grant. This implied grant of an easement of support is similar to an implied grant of a right of way, already considered.

Duty of Care Required in Excavating.—Where the owner of land has, in addition to the natural right of lateral support for his land, an easement of support in the adjacent lot for his land burdened with a building, the owner of the adjacent lot must, in excavating, provide an artificial support sufficient to maintain the building. On the other hand, where there is no such easement of support, such adjacent owner is not held to this absolute liability for damages. The law requires from him only the duty (1) to give notice to the owner of the building, in order that the latter may have an opportunity to protect his property; and (2) to use a reasonable degree of care and skill in making his excavation.

SULLIVAN v. ZEINER.

Supreme Court of California, 1893. 98 Cal. 346, 33 P. 209, 20 L. R. A. 730.

HAYNES, C. * * * The complaint alleges that plaintiff and defendant own adjoining lots in the city of San Francisco; that on plaintiff's lot there is a building, erected 20 years ago, along the line between the two lots; that defendant commenced an excavation on his lot for the purpose of building thereon, and excavated up to the line of, and deeper than the foundation of, plaintiff's building, whereby it is left without the lateral and subjacent support to which it is entitled, etc., and prays judgment for damages and an injunction. * * * There is no allegation in the complaint that defendant's excavation was so made that plaintiff's lot was left without sufficient lateral support if there had been no building thereon, but appellant relies solely upon the proposition that he has gained by prescription a right to the support of his building, whereby the duty is cast upon defendant of protecting it, when the excavation, in the absence of the building, would not have affected his ground.

It is well settled at common law that coterminous owners have a natural right to the lateral support of each other's ground; or, to state it more exactly, that, while a coterminous owner has the right to excavate his own ground for any lawful purpose, he must do so in such manner that his neighbor's ground will not by its own weight, or through the action of the elements, fall into the excavation. * * * Every one has so far the right to have his own soil sustained by that of his neighbor that the latter may not dig so near to the land of the former as to cause the same to fall into the excavation by its own natural weight. * * * But this right of a landowner to support his land against that of the adjacent owner does not, as before stated, extend to the support of any additional weight or structure that he may place thereon. If, therefore, a man erects a house on his own land so near the boundary thereof as to be injured by the adjacent owner excavating his land in a proper manner, and so as not to have caused the soil of the adjacent parcel to fall, if it had not been loaded with an additional weight, it would be damnum absque injuria,—a loss for which the person so excavating the land would not be responsible in damages. * * *

The basis of a right or title by prescription was the fiction of presuming a grant from possession or use for a given time, now for the period required to bar an action for possession. But the possession or use, in order to create the presumption of a grant, must, under the Code as well as at common law, have been made under such circumstances that he whose property or right was affected could have prevented the possession or use, if no grant had in fact been made. * * * In Gilmore v. Driscoll, 122 Mass., at page 207, Gray, C. J., said: "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land, which can be seen or known or interrupted or

sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former."

[We are therefore of the opinion that, since plaintiff's suit is based solely upon an alleged easement of support for his building, and since such an easement cannot be acquired by prescription, the action must fail. The demurrer was properly sustained.

[Judgment for defendant.]

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

OBERT v. DUNN et al.

Supreme Court of Missouri, 1897. 140 Mo. 476, 41 S. W. 901.

SHERWOOD, J. Action for damages bottomed upon the fall of plaintiff's dwelling house, caused by an excavation made for a cellar on the ground of the defendants Lucke. * * *

The evidence offered on the trial is in substance the following: Obert, plaintiff, and the Luckes, owned adjoining lots on Lynch street, in St. Louis. The soil on both lots was a natural bank of clay. The Lucke lot is west of the Obert lot. * * * In March, 1894, the Luckes let the contract for the erection of a building on their lot [to Dunn Bros.] * * * On the 26th of March, 1894, Dunn Bros. gave the plaintiff notice in writing that they would commence, on March 27, 1894, to excavate on the Lucke lot, and would excavate to a depth of about seven feet below the curb on Lynch street, and that it would be necessary for him to protect his building, inasmuch as the excavation would go about four feet below the depth of his cellar wall. In consequence of the notice, Obert called on Dunn on the following day, at the latter's office, and talked to him about his house, asked him what to do, and Dunn told him to underpin his wall; that is, continue it to the depth of the new excavation. Some time afterwards, Dunn went with Obert into the latter's cellar to examine it, and, as an instance and illustration of underpinning, called his attention to a house in the neighborhood, alongside of which a deep excavation had been made for an alley, and which had been successfully underpinned. Obert wanted to know what it would cost to underpin his wall. Dunn said it would cost $137.50, and afterwards told him it could be done for $126. * * * Obert wanted cheaper work, and said he would see another party. On another occasion Dunn met Obert on the pavement in front of the premises, and told him his house would be injured unless he protected it, and asked him what he intended to do about it, and Obert said he had let it to Boettinger. The cellar on the north end of the lot was first excavated. This took four or five days, and was free from mishap. The excavator then began to dig on the front part of the lot, but left an embankment or rim of earth along Obert's wall, a foot wide at the top, and slanting down to a width of three feet at the bottom. He completed the excavation, except the removal of this rim or embankment of earth, and the masons began to put up the walls on the other sides of the lot.

Up to this time Obert had done nothing to protect his house. Then two deputies from the building commissioner's office called on him on two successive days, and told him he must protect his house. Still he did nothing. Finally, on the 7th of April, the building commissioner himself had a written notice served on Obert, informing him that his house was in danger. Thereupon he got Boettinger, a carpenter, on the 9th day of April, to put up four braces against his west wall. These braces were pieces of 6x6 inch pine timber, 26 feet long, placed in the excavation in the Lucke lot, and resting in holes punched in Obert's wall, near the second tier of joists, about 22 or 23 feet above the bottom of the excavation. And this is all that Obert ever did to protect his house. * * *

The evidence shows that braces simply steady the wall, hold it in position, but have no effect to sustain the wall below the point of contact. Plaintiff's wall, therefore, below the second tier of joists, had nothing whatever to hold it except the ground on which it rested, with an excavation immediately adjoining, extending five feet lower. The lateral support of the adjoining lot being removed, the ground on which plaintiff's wall rested was insufficient, without other aid, to support the wall. The weight of the wall caused the ground under it to bulge out, and fall into the excavation. Thereupon the lower part of the wall fell, and finally the house followed. The testimony was uniform that the proper way to support a wall under the circumstances was either to underpin it, or to "needle" it, or to scaffold the various floors on the inside of the building. * * *

If, as shown by the authorities, plaintiff was only entitled to lateral support from the lot of defendants for the soil of his lot in a natural state, and not to such support for a building placed on his land, and if, as also shown by the authorities, defendants, when engaged in excavating on their own land for a cellar, and in the exercise of ordinary care and skill, and after due notice to the owner, are not liable to such owner, though in digging on their own land they dig so near the foundation of the house of their neighbor as to cause it to crack and settle, or even fall down, then it must follow that the only question in the case is whether the digging was done with ordinary care and skill. On this point there is really no evidence to show that the work was done otherwise than in an ordinarily skillful manner. It is true, plaintiff, in testifying, states that "it looked as if they dug under my foundation wall about an inch"; but there is no evidence that defendants did so, and there is no evidence that plaintiff's west line was ever surveyed, and, besides, Taas, who did the excavating, and was plaintiff's witness, testifies that he did not dig over the line onto plaintiff's lot, and, besides that, it must readily be admitted that, after the earth had been dug further down than the foundation wall of another building, the earth under such foundation, unless the building be properly underpinned, will naturally crack and crumble away from the foundation thus exposed, and this is a matter of such common knowledge that we take judicial notice of it. Inasmuch as defendants owed plaintiff's lot no duty to sup-

port it when incumbered by the weight of his building, it must needs follow that defendants were under no obligation either to excavate the foundation for their cellar by piecemeal, or to build their wall in sections.

[Judgment for defendant.]

GERST v. CITY OF ST. LOUIS et al.

Supreme Court of Missouri, 1904. 185 Mo. 191, 84 S. W. 34, 105 Am. St. Rep. 580.

BRACE, P. J. This is an appeal from a judgment of the St. Louis city circuit court in favor of the plaintiff, Catherine F. Gerst, for the sum of $1,738.88, against the defendants, the city of St. Louis and the Heman Construction Company. The plaintiff is the owner of a lot in said city on which are two houses known as Nos. 3015 and 3017 Newstead avenue, fronting 33 feet on the west line of said avenue, the north wall of said buildings extending back therefrom along the south line of an alley, which the petition alleges is about 9 feet 6 inches wide; and for cause of action the plaintiff in her petition alleges: "That on or about the 10th day of March, A. D. 1898, the defendants, the Heman Construction Company and the city of St. Louis, dug an excavation for a sewer in said alley, and along the southern line thereof, and did said work so carelessly and negligently as to cause the sinking, breaking, crumbling, and shattering of two new houses on said land, known as Nos. 3015 and 3017 Newstead avenue, and the improvements connected therewith, and the almost total destruction of the northern one of said houses."

[The evidence shows that, before undertaking to excavate alongside of plaintiff's foundation walls, the city engineer gave directions to the construction company to lay the sewer in the alley to a depth of 16 or 17 feet, and drove stakes indicating where the excavation was to be made. This necessitated the excavation of the entire alley, with the exception of an inch on either side of the ditch.] When this became apparent, the representative of the construction company remonstrated to the representative of the city who was in charge of the work that to make the excavation and put in the sewer under such conditions would endanger the safety of the building, and Mr. Wall, as such representative of the city, said that was all the space there was for it, and that the excavation would have to be made according to the lines indicated by the stakes; and the Heman Construction Company went on and did the work precisely according to the contract and directions of the representative of the sewer commissioner. The width of the excavation consuming almost the full width of the alley or right of way, and the plaintiff's house extending two inches to the north of her own lot and over and upon the right of way, it was impossible to avoid laying bare the foundation of the north wall, though the excavation or opening did not at any point extend across plaintiff's line, or to her lot, or under house. Sheet-

ing of timbers two inches thick was laid on each side of the excavation, being against the earth on the north and against the stone foundation of the house on the south, and braced with 4 in. x 4 in. and 4 in. x 6 in. timbers extending across the ditch, and wedged in between the sheeting. There were also braces put in the tunnels mentioned. These openings were not all made at once, but by degrees from east to west, and by making new openings as the pipe was laid and the excavation filled to the rear; and all the timber made use of in sheeting and bracing as aforesaid was left in place undisturbed for the protection of the building, and the earth as it was put back into the opening was carefully rammed. Despite the careful manner in which all this was done, in a short time—plaintiff's witnesses say before the work had passed the house, and defendant's witnesses say afterwards—the house began to settle, and the walls began to crack, and the tenants were required to move out of it. * * *

1. The principal question presented by this record for determination is whether a legal duty is imposed on one who proposes to make an excavation on his own premises which may endanger the building of his neighbor, to give the latter notice of what he proposes to do, so as to enable him to take the necessary measures for the preservation of his property. In the last edition of Judge Thompson's great work on Negligence the law on this subject may be found thus stated: "Whatever may be the right of one landowner to excavate his own soil so as to deprive his neighbor's land of its support, the authorities are agreed that he must exercise what care and skill he can to prevent injury to his neighbor, and, if he inflict an unnecessary injury upon his neighbor through negligence, he must pay the damages. Thus the authorities are agreed that one who proposes to excavate, or to make other alterations or improvements upon his own land, which may endanger the land or building of his neighbor, is bound to give the latter reasonable notice of what he proposes to do to enable him to take the necessary measures for the preservation of his own property. * * * The failure to give such notice is, in theory of the law, such negligence as will render him liable for any damage to the property of the adjoining owner which may be occasioned by the work which he does on his own land in the absence of knowledge on the part of such adjoining owner otherwise acquired. * * * Nor does the giving of such notice exonerate him from further duty toward the neighboring landowner. He must still conduct the work of excavating with reasonable care and skill, and is liable to his neighbor for damages caused by the want of it. On the other hand, having given this notice, and having afforded his neighbor a reasonable opportunity to protect his own property, he is not answerable for any injury which may happen to the property of his neighbor, provided he proceeds with the work of excavation on his own land with reasonable care and skill." 1 Thompson on Negligence, p. 1109. The same doctrine is thus more tersely stated by another eminent author in a recent work: "In the exercise of proper care a party excavating near a building on the land of another is required to give notice to the

owner of such building of the intended improvement, unless such owner has actual knowledge of the work proposed." Jones on Easements, p. 610. Other text-writers and many adjudicated cases are cited by these authors in support of the texts, and this doctrine is now well supported by the weight of modern authority. * * *

We have no hesitation now in directly holding that it is the duty of one who makes an excavation on his own land, deeper than the foundation of a building on an adjoining lot, and so near to such building as to endanger it, to notify the adjoining owner of the proposed excavation, and afford him a reasonable opportunity to protect his property, and a failure to discharge such duty is negligence, for which an action may be maintained for the injury resulting therefrom, unless the adjoining owner had actual knowledge of such proposed excavation, and there is no good reason why this rule should not be applied to municipal corporations and their contractors as well as to other persons. The suggestion that the plaintiff had such notice in this case from the fact of the publication in the newspapers of the ordinance creating the sewer district and providing for the construction of sewers therein and the registering of the contract therefor, is wholly untenable. In fact, the impending danger to the plaintiff's building by the proposed excavation did not become apparent even to those in the immediate charge of the work, until the line of the sewer was definitely located on the ground by the city engineer immediately alongside the north wall of her building. When it became so apparent to the city engineer and the contractor, it became their duty to notify the plaintiff of the impending danger to her property, and afford her an opportunity to protect the same. This duty they failed to discharge. The work proceeded without the knowledge of plaintiff, and as a necessary consequence thereof her building was injured, and for the injury the defendants ought to be held liable. * * *

[Judgment for plaintiff.]

SECTION 4.—EASEMENTS OF WAY

1. Private Rights of Way Incident to Dominant Tenement

FIELD et al. v. BARLING et al.

Supreme Court of Illinois, 1894. 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311.

Craig, J. This was a bill brought by Henry A. Barling, Edward H. Green, and Edward D. Mandell, trustees under the will of Edward Mott Robinson, deceased, against Marshall Field et al., to enjoin them from building or constructing any building, bridge, passageway, or other construction on, upon, or across the alley known as Holden place or court, between the north line of Washington street and complainants' property described in the bill. The block in the city of Chicago, bounded by Wabash avenue, Randolph, State, and Washing-

ton streets, is known as block 13 of Ft. Dearborn addition to Chicago. The land, when platted, belonged to the United States, and the plat of Ft. Dearborn addition was executed and recorded in June, 1839. The * * * plat shows State street, Washington street, and Wabash avenue, and Randolph street as originally laid out; also Holden place. The plat also shows the location of complainants' property, and the location of Field's old building, and the new one, and the point where it was proposed to erect the bridge across Holden place, connecting the two buildings.

Holden place, as will appear from the plat, is 40 feet wide, extending north and south, through blocks 13 and 14, with lots on each side; those on the east fronting on Wabash avenue, those on the west fronting on State street. Holden place has been used as a public place or street for many years. The defendants' lots on the northeast corner of Washington and State streets, have a frontage of 160 feet on State, extending back to Holden place, covered by a six-story building, occupied by Marshall Field & Co. for several years as a dry-goods house. The defendants have acquired lots on northwest corner of Wabash avenue and Washington street, with a frontage of 108 feet on Wabash avenue, extending back to Holden place. On the latter lots the appellants commenced the erection of a new building, nine stories high. At the time of the filing of the bill, the new building had been erected six stories high, and the appellants were about to commence the erection of a bridge or passageway over Holden place, connecting the old and new buildings. The bridge or passageway, as disclosed by the answer, was to be 18 feet above the surface of Holden place, 3 stories in height, extending north from Washington street over the alley, the entire width of the alley, the distance of 45 feet and upward, 55 feet or 73 feet above the ground.

It is charged in the bill that "the effect of said construction of such connecting building, if the same be not prevented by this honorable court, will be to deprive your orators' said building and the occupants thereof to a great extent, of sunshine, light, air, and warmth, which they have hitherto enjoyed, by reason of the opening and keeping open of said court or alley from the time of said platting and subdivision down to the present; will give said alley an appearance of a private gateway and passage; will hinder and deter traffic, and in many other ways cause serious and continuing damage to your orators and their property; that such damage will amount to many thousands of dollars, and will be beyond legal remedy or relief, if not prevented by this court." It is also alleged that orators and Marshall Field & Co. and the other defendants held their respective lands on said block 13 under a common source of title, viz. the United States, by patents made by the United States in pursuance of a subdivision plat and sales by the United States; "that by reason of the exhibition and publication of the said subdivision and plat, and by the sale of lots thereunder to the respective grantors of your orators and the said defendants Marshall Field & Co., or said Marshall Field, for their use, there has resulted, as between your orators and the said Marshall Field & Co., or such of them as

own the said properties so fronting south on Washington street, on either side of said alley, a right in law to have the said alley remain absolutely and wholly open forever, of the same dimensions and to the same extent as delineated by the United States upon the subdivision and plat aforesaid. * * *

In Town of Lake View v. Le Bahn, 120 Ill. 92, 9 N. E. 269, when a lot owner filed a bill to enjoin the town from prosecuting him for an alleged obstruction of a strip of land in what was deemed to be a platted street, on the ground that the dedication was invalid, the court directed the dismissal of the bill, and, among other things, said: "Each block was thus [by the plat and conveyance with reference to it] burdened with the easement of a street upon a strip of land 33 feet wide around it, and entitled to the benefit of the easement of a street of like width upon the adjoining side of the opposite block, so far as there was a block opposite, thus making a street 66 feet wide around each block. * * * In taking the several blocks of land with the arrangement of this system of streets, there were implied mutual agreements that the streets should ever remain as platted,—a dedication to the public use of the ground laid out as a street, as effectual as could have been made by deed solemnly executed. * * * He [the adjoining lot owner, claiming to the center of the street] took and held an estate upon the condition of its being burdened with the easement of the streets, and the public authorities, on opening and improving the streets, act as for the representatives of the lot owners with others in so doing."

We do not understand that appellees' right to have Holden place kept free and clear of all obstruction rests on any personal covenant of the appellants, although that expression may be found in some of the cases; but when the original proprietor of the subdivision made the plat dividing the land into blocks and lots, streets and alleys, and sold and conveyed the lots with reference to that plat, a right arose in favor of the purchasers of lots fronting on Holden place of having the street forever kept open; not that it should be kept free from obstruction on the surface of the soil alone, but to the sky. No grant or covenant was required to create this right. The dedication of the street by the plat, the sale of lots with reference to it, conveyance of abutting lots, and the payment of the money for the conveyances, were elements sufficient to create the right. The right may be regarded in the nature of incorporeal hereditament. It became appurtenant to the lots. As to the rights secured, they are plain,—to have the street kept open, so that free access may be had to and from the lots abutting on the street, and that light and air may pass unobstructed across the open space between the surface of the street and the sky.

[We are therefore of the opinion that the decree of the lower court, enjoining defendant from interference with plaintiff's easement of light, air, and way in the said Holden place, was the proper one, and it will be affirmed.]

HOOSIER STONE CO. et al. v. MALOTT et al.

Supreme Court of Indiana, 1891. 130 Ind. 21, 29 N. E. 412.

[This was a bill for injunction to restrain the defendant, Hoosier Stone Company from allowing others to use a private right of way across plaintiff's land.]

OLDS, J. The facts as found by the court in this cause are, in substance, as follows: On the 19th day of December, 1883, the appellees, Josie F. Malott and John E. Malott, and the appellant William P. Malott were the owners of the S. E. ¼ of the S. E. ¼ of section 33, township 6 N., range 1 W., in Lawrence county, Ind.; also other lands intervening between said tract in section 34, same township and range, and the Louisville, New Albany & Chicago Railroad, which ran through said section 34. On said day they sold and conveyed to the appellant the Hoosier Stone Company, in consideration of $3,000, by warranty deed, said first-described 40-acre tract of land, together with a right of way for a railway switch track from the line of said railroad over the said lands of the appellees and said William E. Malott, in said section 34, to said 40-acre tract conveyed as aforesaid, and pursuant thereto put said Hoosier Stone Company in possession thereof. The Hoosier Stone Company constructed a railroad south from said railroad to said 40-acre tract so conveyed to it, which it has since used in conveying its stone quarried on said 40-acre tract to said railroad, and over which said switch said railroad company has conveyed its cars in transporting said stone so quarried on said 40 acres, at the instance of said Hoosier Stone Company. On the 1st of February, 1889, the Hoosier Stone Company, without the knowledge or consent of appellees, and for a valuable consideration, subleased and conveyed to appellants Gilbert and Henry Perry, Frederick, William, and Sarah Mathews, and Philip N. Buskirk the right to pass over and use said switch and way and to transport their stone over the same, said parties being engaged in quarrying stone in considerable quantities on lands of their own adjacent to said 40-acre tract so sold to the Hoosier Stone Company, and the sublessees have ever since almost daily had their stone conveyed over said switch by means of locomotive and cars of the Louisville, New Albany & Chicago Railroad Company; and they claim the legal right, by reason of the facts aforesaid, to continue so to do; and the Hoosier Stone Company claim the right to sublease said right of way, and deny the right of the railroad to run over said switch, except as licensed so to do by said Hoosier Stone Company. The appellees filed their complaint in this action, alleging the facts in detail, and describing the land, asking that the lessees of the said company be perpetually enjoined from the further use of the switch and right of way, and for damages. The appellants demurred to the complaint. * * *

This presents the principal question in the case, as to what rights the stone company acquired by the conveyance of the way, and what it may be used for and by whom. The complaint sets out the conveyance, and the answer alleges the conveyance, and claims a right on the part of

the company to use the way itself, and to authorize a general use of it by others to convey the products of their stone quarries upon other lands than the 40 acres so conveyed to the stone company. Private ways are either appendant or in gross. Ways appendant are incident to an estate; they ripen to the land, concern the premises, and pertain to its enjoyment, and pass with the land. * * * The conveyance in this case by warranty deed conveyed the 40 acres of land, and with it designated also a right of way for a railway switch across other lands, to the Louisville, New Albany & Chicago Railroad. * * * It constituted a grant of the 40 acres and a way across the other land from such tract to the railroad. It was a grant of a way appendant, and is incident to the estate of the company in the 40 acres. It inheres in the land, and concerns the premises, and pertains to the enjoyment of the same. It is held that, where land is granted with a right of way, that right is appurtenant to every part of the land thereafter granted. Watson v. Bioren, 7 Am. Dec. 617. The way is granted for the benefit of the particular land, and its use is limited to use in connection with the enjoyment of such land. Such a way cannot be converted into a public way without the consent of the grantors, and the grantors have the right to rely on its use being limited to the purpose for which it is granted—or, in other words, its legal use—and can prevent the use of the way for purposes not authorized. If, as contended by the appellants, the Hoosier Stone Company has the right to sublease or to permit the use of it by its co-appellants for the transportation of the products of the stone-quarry situate upon other lands, it may extend such use to others or permit its use for general public traffic. This would be entirely inconsistent with the rule of law governing the use of private ways. * * *

[Decree granting an injunction affirmed.]

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2. Railroad Rights of Way

PITTSBURG, FT. W. & C. RY. CO. et al. v. PEET et al.

Supreme Court of Pennsylvania, 1893. 152 Pa. 488, 25 A. 612, 19 L. R. A. 467.

[This was an action of ejectment brought by the railroad company against the defendant to prevent him from building a warehouse upon a portion of the railroad right of way.]

Paxson, C. J. * * * [The plaintiffs show title to the premises in question by deeds granting a right of way for railroad purposes.] The defendants contended that, if the plaintiffs did actually condemn the strip of ground in question, they could not recover in ejectment, for the reason that they did not acquire a fee in the ground, but only an easement, and that ejectment will not lie for a mere right of way.

The vice of this argument consists in treating the plaintiffs' right as a mere easement or right of way. It is a great deal more than a right of way. It has the actual possession of the property, and that possession

is exclusive, at all times and for all purposes, except where a way crosses it. Railway Co. v. Hummell, 44 Pa. 375; Railroad Co. v. City of Philadelphia, 88 Pa. 424. The estate acquired by a railroad company by a condemnation of land is often spoken of as an easement, but the term is used in a loose way, for the purpose of distinguishing it from a fee.

In the recent case of Pennsylvania S. V. R. Co. v. Reading Paper Mills, 24 A. 205, it was said by our Brother Mitchell: "Such title is sometimes called an 'easement,' but it is a right to exclusive possession, to fence in, to build over the whole surface, to raise and maintain any appropriate superstructure, including necessary foundations, and to deal with it within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee. There was no such easement at common law, and it may well be doubted if it is not a misnomer to extend to this newly invented interest in land the name of easement, perhaps appropriate enough to the railroad's ordinary right of way for its tracks. It would seem to be rather a fee in the surface and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cesser of the use for railroad purposes. But, whatever it may be called it is, in substance, an interest in the land, special and exclusive in its nature, and which may be the subject of special injury by the obstruction of access to the abutting street, and therefore within the rule which governs the application of equitable relief. The right of exclusive possession includes the right of ingress and egress from the street, and in this respect the injury is exactly the same as to a tenant for life or for years, whose right to relief would be unquestionable, and is entirely different from the general right of the public to pass along the street." * * *

We are of opinion that, under the evidence in the case, the court below was justified in directing a verdict in favor of the plaintiffs.

Judgment affirmed.

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3. Street Railway Lines

Street Railway Not an Additional Burden on Street.—Where abutting property owners have already granted a portion of their land for the creation of a street or way, the building of a street railroad upon such established streets, and the running of cars for the transportation of passengers do not constitute an additional burden on the land, but are uses contemplated when the street was located. This is held, even where the fee or ownership of the land occupied by the street remains in the property owners, and the right of the public to use the street is in the nature of an easement. Therefore the consent of abutting property owners to the construction and operation of a street railroad is not essential unless required by the state Constitution or by state statutes.

Necessity of Legislative Consent.—Rights of control and use of streets are in the public. A city government holds such rights merely

as trustee for the public benefit, and, unless clearly authorized by legislative enactment, it cannot surrender any portion of these rights to private persons or corporations. Thus a city usually has not the power to grant a franchise to a street railway, at least where the franchise is unlimited as to time and which does not reserve the power of revocation. Such a franchise differs from a mere license, which is revocable and subject to regulation and control of the city. Legislative enactment is essential to the grant of an irrevocable franchise.

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4. Telegraph and Telephone Lines

Authority for Installation on Streets.—Since the right of use and control of streets is in the public, it follows that legislative sanction is essential to authorize the use of streets for telegraph or telephone lines and poles. Such authorization may be given directly, or it may be given indirectly through the delegation of the legislative power to a city government. Generally a city or village has the power to grant to a telephone or telegraph company the right to construct a line upon its streets.

Necessity for Consent of Property Owners.—The placing of telegraph and telephone lines upon a street constitutes a new use of the street, and therefore this is an additional burden for which abutting property owners are entitled to compensation. Their consent, therefore, must be obtained, whether the consent be voluntary or involuntary by condemnation proceedings. However, in any case in which the absolute ownership in the street or highway is vested in the public, there can be no legal objection to a grant by the public of the right to erect such poles and lines, and the consent of abutting property owners is not necessary.

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5. Rights as Between Holders of Easements of Way—Induced Current Interference

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. UNITED ELECTRIC RY. CO. et al.

Circuit Court of the United States, M. D. Tennessee, 1890. 42 F. 273, 12 L. R. A. 544.

[This was a bill for injunction filed by the telephone company against the defendant street railway company to restrain the latter from operating its street cars by means of electrical current. The bill charged that the electricity generated by defendant, which is supposed to return to the dynamos by means of a return metallic circuit consisting of the steel rails upon which defendant's cars run] scatters through the earth, and is thereby conducted to the wires of the telephone com-

pany through various agencies, known as "conduction" or leakage, and this current, being stronger, overcomes the weaker current of the telephone, producing loud, buzzing noises, and wholly preventing, or greatly interfering with, telephonic communication. Besides, the electricity thus conducted acts upon the bells of subscribers when there is no call from the central office, causing them to ring, and also causing a great number of the annunciators at the exchange to fall at one time, so that the operators cannot tell who, if any one, has called. That, if the currents used by the cars were constant and uniform, it would not interfere with the telephones. It further averred that the service was interfered with by *induction,* where a varying current of electricity, conveyed on a conducting wire, will produce in a parallel wire other currents of electricity. The varying current upon the trolley line induces a like current in the parallel telephone wires on the same street, and also, as in the case of conduction, produces the noises and sounds, and rings the bells of subscribers, and throws down the annunciators. The bill also charged that the single trolley was dangerous to life and property. If, by winds and storms, a telephone wire should break, and fall across the trolley, it might be fatal to man or beast to touch it, and dangerous to the lives of those in the telephone exchanges, sometimes causing fire in the houses of subscribers. The bill concluded that all these troubles and dangers would be avoided if defendants would use an entire metallic circuit, or double trolley, properly constructed, and that the same result would follow if complainant would use a complete metallic circuit for every one of its subscribers; but the latter would nearly double the cost of the plant, and grave difficulties would be encountered at the central office, which it was not certain could be successfully overcome. On the contrary, the single trolley could be converted into a double trolley at a comparatively small expense. That, in consequence of these interferences, subscribers make constant complaints, many threaten to, and some actually do, refuse to pay for their telephones. * * *

BROWN, J. * * * Complainant, in operating its instruments, connects each telephone with the ground by what is termed a "ground wire," through which the return current of electricity is carried to the earth, and perhaps through the earth, acting as a conductor, back to the telephone exchange. Such return, in some form or other, is necessary to the production of a current of electricity in every case. Defendants, upon the other hand, use a single overhead wire or trolley, suspended over the middle of the track, along which the electric current passes, descending by the trolley rod or mast through the cars to the motors underneath, and thence to the rails, which are connected together at their ends, and which operate to convey the return current back to the dynamos at the power-house. The evidence, however, establishes the fact that the current does not all return by the rails. Much of it escapes, becomes scattered through the earth, ascends through the ground wires to the telephones, and seriously impairs their operation, by causing a humming or buzzing noise, which drowns the voice of the speaker, and often causes the annunciators in the exchange to

fall, and the bells to give false calls, so that it is impossible for the operators to tell which, if any, of its subscribers have called, and, in short, throws the whole system into confusion.

That these evils exist, to the serious detriment of the telephone service, is not denied; but it also appears from the evidence upon both sides that they are not absolutely insurmountable. Indeed, there are but few serious questions of fact in this case, and these turn upon the relative practicability and expense of the several methods of overcoming this difficulty. * * * Let us consider the respective methods now suggested:

1. The double trolley. There seems to be no doubt that if defendants adopt a second trolley wire, the return current might be carried back to the dynamos without coming in contact with the earth at all, and the difficulty be completely overcome. Upon the other hand, we are satisfied from the affidavits that this would not only entail a large expense upon the defendants, but that it disfigures the streets with a complicated net-work of wires, and, wherever there are curves, turnouts, or switches, renders the road very difficult of operation. * * *

2. There seems to be no doubt that the evil may also be remedied by a return wire attached to each telephone, by which the current is carried directly back to the exchange, instead of being dumped into the earth. This, however, is open to the same objection as the double trolley. It is not only very expensive, doubling the cost of the electric plant, but would double the number of wires carried through our streets, already far too numerous for comfort, beauty, or safety. * * * Upon the whole, we deem this to be impracticable.

3. A third device, known as the "McCluer System," remains to be considered. This contemplates the employment of a single return wire upon each route disturbed by the railway service, to which each telephone upon that route is connected and which operates to complete the metallic circuit. If we are to believe the affidavits of those who are familiar with this device, it affords a perfect remedy for all disturbances produced by leakage or conduction, though there are also slight disturbances produced by induction from parallel wires, from which no complete relief has been discovered by any kind of metallic circuit, unless supplemented by the use of non-inducting cables, and the transposition of wires. This evil, however, is remediable by increasing the distance between the parallel wires, and does not seem to be regarded as a serious matter. * * * We think we are justified in assuming that the adoption of this device by the complainant would obviate the disturbances now produced by leakage.

The case, then, practically resolves itself into the question, at whose expense shall this change be made? As the testimony tends to show that the introduction of the McCluer device into the telephone service of Nashville would not cost to exceed $10 to each telephone, the question is not vital to the existence of either of these companies. At the same time, as it is one that confronts the telephone and electric railways in every city of the country where both are used, it becomes of great importance. Are the telephone companies, which have the prior right to use the streets, bound to conform their business to the demands of

these new-comers, though by so doing they put themselves to large expense? Or are the railway companies bound, as a condition of occupying the same territory, to see to it that, in operating their roads, no incidental damage is done to their neighbors? If the existence of one was absolutely incompatible with the continued operation of the other, it might be incumbent upon us to make a choice between these two great benefactions, both of which will rank among the necessities of modern urban life. But, as we are bound to assume that they can be persuaded to live together in harmony, the case virtually resolves itself into a question of liability for certain damages sustained by the complainant. * * *

The substance of all the cases we have met with in our examination of this question * * * is that, where a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. Hoyt v. Jeffers, 30 Mich. 181. If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction; but, as the proofs show that a more effectual and less objectionable and expensive remedy is open to the complainant, we think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained. * * * The motion for an injunction must be denied.

HUDSON RIVER TEL. CO. v. WATERVLIET TURNPIKE & R. CO.

Court of Appeals of New York, 1892. 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838.

[Bill for injunction against the defendant street railway company to restrain defendant from operating its cars by the single trolley system of propulsion, on the ground that the transmission of a strong current of electricity along its trolley wires creates interference in the

wires of the plaintiff telephone company by induction and conduction. The franchise of plaintiff telephone company was granted on the express condition that the maintenance of its lines should not interfere with the enjoyment by the defendant street railway company of its franchises.]

MAYNARD, J. * * * Neither priority of grant nor priority of occupation can avail either party. The plaintiff has a franchise which is entitled to protection, but the prime difficulty it encounters grows out of its subordinate character. It has been given and accepted upon the express condition that it shall not obstruct or interfere with the enjoyment by the defendant of its franchises. The plaintiff is not using the streets for one of the purposes to which they have been dedicated as public highways, while the defendant is occupying them in such a manner as to expedite public travel and promote the public use, to which they were originally devoted. The condition contained in the plaintiff's grant would have been implied, had it not been expressly named. The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. The inconvenience or loss which others may suffer from the adoption of a mode of locomotion authorized by law, which is carefully and skillfully employed, and which does not destroy or impair the usefulness of a street as a public way, is not sufficient cause for a recovery. * * *

These considerations necessarily dispose of one of the grounds upon which the plaintiff claims to be entitled to relief from the special injury sustained by the acts of the defendant, namely, the derangement of the electric currents upon its lines of wire by means of induction, as it is called in electrical dynamics. It seems to be indispensable to the successful prosecution of the plaintiff's business that it should make use of an exceedingly weak and sensitive current of electricity. By a law of electric force, not clearly defined or understood, the transmission of a powerful current, such as the defendant must use to supply motion to its cars, along a line of wire parallel with and in close proximity to the plaintiff's wires, induces upon the latter an additional current, which renders the operation of the plaintiff's telephones at all times difficult and sometimes impracticable. It is found that this disturbance cannot be avoided by the defendant without a complete change of the system adopted, and the use of motors which are more expensive, more dangerous, and less useful and efficient. It is obvious that to require such change to be made would be to grant to the plaintiff by a decree of the court, that which the legislature has expressly and intentionally withheld.

But the plaintiff is exposed to another danger which deserves consideration. Its system of communication is only partially established in the public streets. Its telephones are located upon the premises of its subscribers and patrons, and at a central exchange, which is upon private property. Its instruments are connected by branch wires with the main wires suspended upon the poles in the streets. To render their respective plants available, both parties must have a return electric cur-

rent, and both use the earth for that purpose. * * * The defendant allows the electric current used for the movement of its cars to escape or discharge, at least in part, directly from the rails into the ground, from whence it spreads or flows, by reason of the conductivity of the earth, upon plaintiff's grounded wires, and the most serious loss which the plaintiff sustains results from this cause, which is scientifically known as "conduction."

The defendant insists that it has an equal right with plaintiff to make use of this property or law of nature in the conduct of its business, just as all are entitled to the common use of the air and the light of the heavens, which, in a certain sense, is undoubtedly true. But the defendant does something more. It does not leave the natural forces of matter free to act unaffected by any interference on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff, to its damage. We are not prepared to hold that a person, even in the prosecution of a lawful trade or business upon his own land, can gather there by artificial means a natural element like electricity, and discharge it in such a volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. It is difficult to see how responsibility is diminished or avoided because the actor is aided in the accomplishment of the result by a natural law.

It is not the operation of the law to which the plaintiff objects, but the projection upon its premises, by unnatural and artificial causes, of an electric current, in such a manner and with such intensity as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property and use it for a motive power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands and destroy his property, and shield himself from liability by the plea that it was not his act, but an inexorable law of nature, that caused the damage. * * * But the record before us does not require a determination of the question in this form. The use which the plaintiff is making of its grounded wires is part of its system of telephonic communication through the public streets, and a necessary component of the service it maintains there under the permission of the state, and is subject to the condition that it shall not incommode the use of the streets by the public. It is one indivisible franchise, and is in its entirety subservient to the lawful uses which may be made of these thoroughfares for public travel. In this respect no distinction can be made between the injuries resulting from induction and conduction. * * *

[Judgment for defendant.]

SECTION 5.—EASEMENTS IN ARTIFICIAL WATER COURSES

KRAY v. MUGGLI et al.

Supreme Court of Minnesota, 1901. 84 Minn. 90, 86 N. W. 882, 54 L. R. A. 473, 87 Am. St. Rep. 332.

BROWN, J. This was an action to restrain and enjoin defendants from removing or destroying a certain milldam across Sauk river at Cold Springs, in Stearns county. The defendants recovered in the court below. * * * The facts are substantially as follows:

In 1856 a dam was built and constructed across Sauk river at Cold Springs, Stearns county, by the Cold Springs Mill Company, which has ever since, except during a short period in 1865, when out of repair, been maintained for the purpose of developing water power to propel and operate mill machinery. No authority was obtained to so construct or maintain the dam by application or resort to legal proceedings, but the same was so built and constructed without special or granted right, and subsequently maintained by the mill company and its successors for over 40 years, with the acquiescence and consent of the owners of riparian property affected thereby, by reason of which continued maintenance, and the consequent raising of the level of the water, and the adverse, uninterrupted, and exclusive use of the dam for said period of 40 years, the mill company and its successors, Muggli and his grantors, acquired the right by prescription to perpetually maintain the same. The effect of the dam was to raise the level of the waters of the river to a height of 7½ feet, cause the same to set back and overflow large tracts of adjacent land to a distance of about 16 miles up the river, and the formation of several lakes and ponds along its course. By the construction of the dam, and the consequent raising of the level of the waters of the river, the greater part of the land described in the complaint has since that time been overflowed and rendered valueless for agricultural purposes. The * * * defendant Muggli, who owns the mill property, entered into a contract with the other defendants by which he attempted to sell and transfer to them the right to take out and remove the dam; such other defendants paying him for that right and privilege the sum of $5,000. It is claimed by such defendants that by the removal of the dam large tracts of submerged land will be reclaimed and made valuable for agricultural purposes. Acting under this contract, such defendants threatened to take out and remove the dam, and this action was brought to restrain them from doing so. * * *

Plaintiff in this action is in the actual possession, under claim of title, of land bordering on the river, and has improved the same with reference to the conditions existing subsequent to the construction of the dam. His improvements were made in reliance upon the continu-

ance of such conditions, and that the level of the waters in the lakes would remain as it had existed for years prior thereto. * * *

What right in law or equity has the plaintiff to insist upon the continued maintenance of the dam? The right to maintain it on the part of the mill company was acquired by prescription. The mill company, in erecting it, obtained no express grant to do so from the riparian owners; but the erection and maintenance thereof for more than 40 years created a prescriptive right to continue its maintenance perpetually. The inquiry is, what right, if any, accrued to the plaintiff and his grantors, and the other owners of property bordering on the river and the lakes formed thereby, as a result from the acts of the mill company and the acquisition by it of the prescriptive right to maintain the dam? The riparian owners improved their property, erected their buildings and fences with reference to the artificial stage of the water as made by the erection of the dam, and acquiesced in its maintenance during the time necessary to create and establish in the mill company and its successors the perpetual right to do so. It is contended on the part of plaintiff that there grew out of the relations between the parties, with respect to the construction and maintenance of the dam, reciprocal rights and privileges,—the right on the part of defendants to maintain it, and the right on the part of plaintiff to insist that it be maintained. * * * We adopt the contention of plaintiff as most in consonance with the equity and justice of the case. If plaintiff and his grantors acquired a reciprocal right to have the dam maintained, it is not material that its removal will result in less injury and damage to them than to defendants. Prescriptive rights find no support in pecuniary considerations. It is a right or privilege appurtenant and incident to realty, and passes with the title thereto.

The authorities are numerous that where the flow of a stream of water has been diverted from its natural channel, or obstructed by a permanent dam, and such diversion or obstruction has continued for the time necessary to establish a prescriptive right to perpetually maintain the same, the riparian owners along such stream of water, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed; and the person who placed the obstruction in the stream, or caused the diversion of the waters, and all those claiming under or through him, are estopped upon principles of equity from restoring the waters to their natural channel or state. * * *

The dam in question having been erected for the purpose of developing power to operate mill machinery, must be taken to be a permanent obstruction; and, it having existed and been maintained as such for so great a length of time, the artificial conditions created thereby must be deemed to have become the natural conditions. There is no suggestion in the evidence that the dam was placed in the river for temporary purposes, and, even though it may at one time have been out of repair, it was nevertheless originally intended as a permanent structure. The authorities all hold, as far as our examination has extended, that in

such cases the conditions arising from the permanent obstruction, though artificial to begin with, become by long lapse of time the natural conditions, and interested parties are bound by the rules of law applicable to such conditions. * * *

An examination of the books discloses that this same doctrine is applied to public highways and public parks. Where a highway or public park has been laid out by lawful authority, or acquired by dedication or prescription, the owners of property abutting thereon acquire a special right in the continuance of the park, street, or highway, as the case may be, of which they cannot be deprived except by due process of law. The right accrues to them, in cases where the highway or park is acquired by dedication, by the same proceedings and acts that vest the right in the public. Where land is expressly dedicated for a public park, and is improved as such by the public authorities, special rights result and accrue to abutting owners, which vest and are created by the act of dedication.

[We therefore hold that the defendants may be restrained from taking any affirmative steps looking to the removal of the dam.] * * *

STANISLAUS WATER CO. v. BACHMAN.

Supreme Court of California, 1908. 152 Cal. 716, 93 P. 858, 15 L. R. A. (N. S.) 359.

[The Stanislaus & San Joaquin Water Company owned the right to take water from the Stanislaus river for irrigation purposes. The company agreed to furnish and sell to one Threlfall, "his heirs and assigns, during each and every year, for the term hereinafter mentioned, for the purpose of irrigating his tract of four hundred and sixty-one acres of land, a flow of water sufficient to irrigate said land, at the price of $1.50 per acre per year." Later this company made an assignment of all of its assets to the Stanislaus Water Company, plaintiff in this case; also Phelan sold his land to Bachman. The new company furnished the water to Bachman, but demanded a higher price, and brought this action therefor.]

SHAW, J. * * * The rights of Bachman under the agreement are the same as those of Threlfall. * * * The water right, when acquired, became an easement appurtenant to the land * * * and passed with it, upon the * * * sale [to Bachman], in the same manner as any other appurtenance or fixture passes with the title and possession of land. * * * It was an incident of the land, and would pass as such by a conveyance of the land, without express mention and without any reference thereto. * * * We are unable to perceive any material difference in principle * * * between fixtures and improvements attached to or erected upon land and a water right attached to land as an appurtenance, such as that here involved, and we hold that it is governed by the same rules. * * *

We have assumed that the right conferred on Threlfall by the agreement with the canal company was real property. This is controverted by plaintiff, and its argument is, for the most part, founded on the assumption that it was either personalty, or that the agreement constituted nothing more than a personal covenant of that company which does not bind the plaintiff, as its successor. We think neither of these propositions is correct. The water in its natural situation upon the surface of the earth, whether as a flowing stream, as a lake or pond, or as percolations in the soil, is real property will not be disputed. That it may become personalty by being severed from the land and confined in portable receptacles is also evident. * * * The earth is composed of land and water and the water is not different in this respect from other material substances composing a part of the earth. Trees when felled and cut into logs and lumber; coal, iron, gold, and silver when taken from the mine; rocks when quarried from their bed; oil when pumped from the depths; clay when burned into bricks or converted into cement, all are real property before the change, but upon severance forthwith become personalty.

The business of collecting water in reservoirs, conducting it in pipes to houses of a city, and there selling and delivering it to the occupants of such houses, is a process of severing the water from its connection with the earth and changing it into personal property. The person * * * engaged therein is as much engaged in trade and commerce as is the miner, the oil producer, the brickmaker, or the cement manufacturer who sells his product. But the substances in which these persons deal do not become personalty until the severance is complete. The right to the water in the pipes and the pipes themselves, usually constitute an appurtenance to real property in such cases, and, if so, the water usually retains its character as realty until severance is completed by its delivery from the pipes to the consumer. The right in water which has been diverted into ditches or other artificial conduits, for the purpose of conducting it to land for irrigation, has been uniformly classed as real property in this state. "The right to water must be treated in this state as it has always been treated, as a right running with the land and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such, has none of the characteristics of mere personalty." * * *

[Therefore] the agreement is, in legal effect, an agreement to sell a right or interest in real property. Water, flowing in a canal or artificial conduit, and delivered therefrom upon land, for the irrigation of that land, does not change its character from realty to personalty. It remains real property throughout the process, and until it serves its purpose by being absorbed into the land which it moistens. Hence, the agreement to furnish the necessary water from the canal from year to year, during the times specified, and to deliver it upon the Threlfall lands for the irrigation thereof, for an agreed price, was in substance and effect an agreement for the sale of real property of the canal company. Such an agreement, with all its terms, is binding, not only upon the mak-

er, but upon all persons who subsequently acquire the maker's title to the property agreed to be sold, with notice of the agreement. The plaintiff, as we have seen, bought with notice, and it is therefore as much bound to comply with this part of the agreement according to its terms as if it had executed the same. * * *

REGULATION OF PUBLIC UTILITIES

CHAPTER 1

CONTROL OF SERVICE

SECTION 1.—HISTORY

Certain industries from an early date have been deemed of sufficient importance to the public to justify governmental control thereof. The courts have, whenever application has been made to them, demanded that these particular industries charge no more than a reasonable fee for their services. In addition the early English common law often saw fit to make monopolies of these enterprises. This was particularly true of the operation of wharves and ferries. The first forward step taken in the progress of regulation was the enactment of maximum rate laws. Thus the history of a number of the states shows that statutes were passed limiting the fares charged to passengers on railways and surface lines. During regulation by the use of maximum rate statutes, the municipal franchise began to make itself felt as a force in regulation. Whenever a local utility was compelled to obtain the consent of the municipality in order to use its streets for the conduct of business, it became customary to insert in the consent ordinance certain provisions which stipulated the maximum charge which could be made for the service, and, in some instances, the standards of service which were to be maintained.

These methods of regulation proved unsatisfactory for a number of reasons, and beginning with 1905 the various states enacted legislation from time to time creating public utility commissions. Thereafter the problems of regulation were intrusted to commissions. To-day every state in the United States, with one exception, has such a commission. although the powers vary greatly from state to state.

SECTION 2.—"REGULATION" AND "PUBLIC UTILITY" DEFINED

Regulatory legislation to-day touches almost every line of business in some particular. Pure food laws, labor legislation, and statutes setting forth standards of safety in factories are illustrative of this type of regulation. Regulation is here used in its broad sense, but it also has a more technical and restricted meaning. Regulation of public utilities has to do with rather complete control over the finances, service, and rates of the enterprise. The right thus to interfere with the internal management of the company is justified under the police power of the state, which is exercised for the protection and well-being of its citizens.

Just what industries may legally be included within the regulated group is an open question. Court decisions have suggested three tests. These tests follow: (1) Is the industry inherently monopolistic in tendency? (2) Is a municipal franchise a condition precedent to operation? (3) Is the industry clothed with a public interest? That is, is it one upon which the life, happiness, and well-being of the public is dependent? The second of these tests seems to be the least important. It may well be said that an industry may be regulated if, for all concerned, it is best operated under monopolistic conditions, and if its service is essential to the daily comfort and life of its customers. The laws of the various states differ widely as to those enterprises which are subject to regulation, but almost all of them include a certain few. For the purposes of this book, therefore, the term "public utilities" will be used to refer to electric light and power, gas, water, heat, bus, and street railway industries.[1]

All industries which produce these services are not necessarily public utilities. It is only when the management has dedicated its property to public use that regulation may take place. Dedication results from a readiness and willingness to serve any and all who make application for the service. To illustrate: A operates a large factory and generates electricity to supply his own requirements. He disposes of a temporary surplus to a neighboring industry. The parties are at liberty to contract on any terms which prove agreeable to them. The generating plant continues to be private property unaffected with a public interest, as it has not been dedicated to the public. However, should A offer to supply all of the consumers of a certain kind in that locality, it is possible that a public utility might thereby be created.

[1] Telephone, telegraph, and steam railway companies are also utilities, but are largely subject to federal regulation, although the rules relating to regulation of them are much the same as other utilities.

SECTION 3.—CERTIFICATES OF CONVENIENCE AND NECESSITY

The engineer is primarily interested in two phases of regulation, namely, service and rates. Under the law as it exists in most of the states, a person is not free to engage in the utility business whenever and wherever he desires. The majority of the states require all new utilities to offer proof that the convenience and necessity of the public will best be served by their operation. The same is true for an existing utility which desires to extend its service into new territory. Little difficulty is encountered in obtaining the certificate from the state commission, unless it offers competition either directly or indirectly with an existing utility. If the new service offers a pure duplication of existing facilities, no certificate will be issued. Even where the existing service is poor, and subject to numerous complaints, it is generally held that competition will not be permitted until after the operating company has been warned to improve its service. If the result of the proposed operation will be competition only in part or indirectly, the decision must rest upon what is best for the greatest number. The convenience of a few will not justify a new service, if the net result is to deny certain existing and essential service to others. Thus a bus line might be convenient to a number, where it competes with railway service. Yet, if such competition interferes with the service being given by the railway, making it necessary to discontinue a certain portion of it, the bus company should be denied a certificate.

Various factors enter into a decision, where numerous applicants petition for the same certificate. It is generally held, if one of the applicants can render the needed service by an extension of existing facilities, he should obtain the certificate. Other matters which carry weight are past experience in operation, financial stability, and priority in filing the application.

SECTION 4.—STANDARDS OF SERVICE

The quality and quantity of service are both matters which are subject to regulation by the commission. Thus it is the state commission which determines the purity, pressure, and heat content of gas. Standards of service are usually established by the commission after a public hearing, in which all interested parties may be heard. After the evidence is fully considered the commission issues, wherever possible, general orders applicable to all utilities which render the same kind of service.

SECTION 5.—EXTENSION OF SERVICE

A utility which holds itself out as being ready and willing to serve must serve all of those within their territory who apply for the service. Reasonable rules, compliance with which is a condition precedent to the right to service, may be established by the company and placed on file with the commission.

A utility may be compelled to enter into a new section of a city whenever the added income from the extension will justify the necessary investment. Many commissions hold that such an extension must be made if the income will take care of additional operating costs and there is a probability of a return in the near future. This is especially true if the company, at the time the additional service is requested, is earning a good return. It may not choose only the most profitable of the business and refuse to serve the balance of the community.

Occasionally a small community is without a certain kind of utility service. If it can guarantee a fair return on the investment, the commission may force a utility doing business in that general territory to extend its service into the new field. In order for this to be possible, however, the community must be within the general territory which the utility holds itself out as being ready and willing to serve.

SECTION 6.—ABANDONMENT OF SERVICE

In the majority of the states, a utility may not discontinue all or a part of its service without first obtaining the consent of the commission. A portion of the service which is necessary to the convenience of the public may not be discontinued merely because it proves unprofitable, if the business as a whole is operating at a profit. Thus, a street railway may not discontinue one of its lines, which renders a needed service, merely because that line fails to show a profit. However, if the loss from the particular line causes the system as a whole to earn less than a fair return, the commission must permit the line to be abandoned.

Whenever economy measures and increased rates have failed to produce a fair return, and further operation seems likely to add to the losses, a utility is permitted to abandon all operation.

CHAPTER 2

OPERATING EXPENSES

SECTION 1.—IN GENERAL

All utilities, unless the right has been contracted away, may insist that reasonable rates be established for the service which they render. It is generally held that a provision in a franchise which establishes a maximum rate may be set aside by the state commission, and either higher or lower rates provided as the conditions warrant. The courts and commissions at an early date decided that a reasonable rate is one which pays the full cost of rendering the service. The cost of service is said to consist of all reasonable operating expenses and a fair return on the fair value of the property used and useful in serving the public. Stating the rule in another way, the revenue derived from the rate charged for the service must be sufficient to pay all reasonable operating expenses and to afford a fair return on the property invested in the enterprise. The first step in determining any rate, therefore, is to ascertain the total operating expenses which will be required for a year of operation. Operating expenses for the future are usually estimated from the experience of the two or three years preceding the rate hearing. Any definite trends and unusual operating conditions during previous years may be given weight in estimating possible future expenses. The expenses must be reasonable, but the burden lies with the consumer to show that actual operating expenses are unreasonable. It is not the burden of the utility to justify each and every amount paid for the various operating expenses.

SECTION 2.—UNUSUAL EXPENSES

Extraordinary and unusual expenses which have been incurred just previous to the rate hearing may be amortized over a period of time. Thus, the loss from electrical storms, sleet storms, and tornadoes, if unusually heavy, would not all be included in the operating expenses for any one year, but should be spread over at least a five-year period.

The cost of the rate hearing constitutes a disputed item. If all of the costs of a rate hearing are to be recovered from the consumers, there will

be every incentive for numerous rate hearings on the part of the utility. Looking at the matter from the viewpoint of the utility, a rate hearing may be an absolute necessity as a protection to its future existence. In such a case the expense, having been reasonably incurred, should be recouped through the operating expenses. Although there is a measure of conflict, the majority of the courts and commissions permit the expense of the rate hearing to be spread over a period of time. Thus usually one-fifth of the amount would be included in the operating expenses at the time the rate is established.

SECTION 3.—DEPRECIATION AND MAINTENANCE

The investment in property used in serving the public must be preserved for the investor. The property is constantly diminishing in value as a result of wear, tear, exposure to the elements, and the various forms of obsolescence. Therefore a sufficient reserve must be built up out of the operating expenses to replace the equipment when its economic life has expired. The annual charge to be made to operating expenses for depreciation must therefore be based on the expected useful life of the property.

In addition to replacing the property when it is no longer useful, certain expenditures are required annually to maintain the property in efficient operating condition. The expenditures for the maintenance of the property form a legitimate portion of the operating expenses. However, inasmuch as the amount of such expenditures vary greatly from year to year, any estimate for the future should be based on a relatively long period in the past. The fact that property has been undermaintained in the past offers no justification for the inclusion of a much larger amount in the future. The future consumers should not be compelled to pay for something which has benefited the past consumers. Only the usual or average amount may be included in the operating expenses for the future. Any expenditure which has the effect of extending the normal life of the equipment is not a proper charge to maintenance, but is in the nature of a replacement, and should be charged to the reserve for depreciation.

GALVESTON ELECTRIC CO. v. CITY OF GALVESTON et al.

Supreme Court of the United States, 1922. 258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678.

Suit by the Galveston Electric Company against the City of Galveston and others to restrain the enforcement of an ordinance fixing street car fares. From a decree dismissing the bill without prejudice (272 F. 147), complainant appeals. Affirmed.

Mr. Justice BRANDEIS delivered the opinion of the court.

The street railway system of Galveston was started as a horse car line in 1881. It was electrified about 1890, and after the hurricane of 1900 was largely rebuilt. * * * At no time has the full fare on the railway been more than 5 cents—except during the period of 8 months, from October 1, 1918, to June 5, 1919, when 6 cents was charged. This higher fare was authorized by ordinance of the municipal board of commissioners, which possesses regulatory powers; and on June 5, 1919, the same board reduced the maximum fare to 5 cents. The latter ordinance was passed after a hearing and a finding by the board that with the reduced rate the company would continue to earn a fair return. Under the 1919 ordinance the company operated for 11 months. Then it brought this suit, in the federal court for Southern Texas, to enjoin its enforcement. The company contends that the fare prescribed is confiscatory, in violation of the Fourteenth Amendment; the city, that it is sufficient to yield a return of 8 per cent. on the value of the property used in the public service.

A temporary injunction having been denied, the court appointed a master to take the evidence and make advisory findings. There was substantially no dispute concerning the facts past or present. It was assumed, in view of then prevailing money rates, that 8 per cent. was a fair return upon money invested in the business. The experts agreed on what they called the estimated undepreciated cost of reproduction on the historical basis; that is, what the property ought to have cost on the basis of prices prevailing at the time the system and its various units were constructed. They agreed also on the amount of gross revenue, and on the expenditures made in operation and for taxes, except as hereinafter stated. The differences between the parties resulted mainly, either from differences in prophecy as to the future trend of prices or from differences in legal opinion as to the elements to be considered in determining whether a fair return would be earned. These differences affected both the base value and the amount to be deemed net revenues. The master, who heard the case in October, 1920, and filed his report in November, made findings in which he advised that the fare was confiscatory. The District Judge, who heard the case in January, 1921, found a much smaller base value and much larger net revenues; stated that he did not deem it necessary to determine whether the ordinance "will produce exactly 8 per cent. or a little more or a little short of it"; declared that he was "not satisfied that the ordi-

nance produces a return so plainly inadequate as to justify this court in interfering with the action of the municipality in the exercise of its rate-making function"; and in March, 1921, entered a decree dismissing the bill without prejudice. In April he denied a petition for rehearing. 272 F. 147. The case comes here on appeal under section 238 of the Judicial Code (Comp. St. § 1215.)

The undepreciated reproduction cost on the historical basis—which seems to be substantially equivalent to what is often termed the prudent investment—was agreed to be $1,715,825. The parties failed to agree in their estimates of the depreciation accrued up to 1921. The master estimated that, based on the 1913 price level, it was $390,000; and this estimate the court accepted. Thus measured, the value of the property, less depreciation, was $1,325,825. The court found that the net earnings under the five-cent fare for the year ending June 30, 1920, had been $90,159, and for the year ending December 31, 1920, $109,286, and estimated that for the year ending June 30, 1921, it would be at least $111,285. The return so found for the year ending June 30, 1920, is 6.8 per cent. of $1,325,825; for the calendar year 1920, 8.2 per cent., and for the year ending June 30, 1921, 8.4 per cent. * * *

First. As the base value of the property, master and court took—instead of the prudent investment value—the estimated cost of reproduction at a later time less depreciation; and in estimating reproduction cost both refused to use as a basis the prices actually prevailing at the time of the hearings. These had risen to 110 per cent. above those of 1913. The basis for calculating reproduction cost adopted by all was prophecy as to the future general price level of commodities, labor, and money. This predicated level, which they assumed would be stable for an indefinite period, they called the new plateau of prices. As to the height of this prophesied plateau there was naturally wide divergence of opinion. The company's expert prophesied that the level would be 60 to 70 per cent. above 1913 prices; the master that an increase of 33⅓ per cent. would prove fair; and the court accepted the master's prophecy of 33⅓ per cent. Thus both master and court assumed a reproduction cost, after deducting accrued depreciation, of about $1,625,000. On this sum the net earnings found by the court yielded—after deducting a 4 per cent. depreciation annuity on property subject to depreciation, a maintenance charge, and a charge for taxes, other than the federal income tax—a net return of 5½ per cent. for the fiscal year ending June 30, 1920, of 6.7 per cent. for the calendar year 1920, and the promise of more for the fiscal year ending June 30, 1921. But to fix base value the master added, and the court disallowed, items aggregating nearly $600,000, which must now be considered.

The most important of these items is $520,000 for "development cost." The item is called by the master also "going concern value or values of plant in successful operation." * * * The going concern value for which the master makes allowance is the cost of developing the operating railway system into a financially successful concern. The only evidence offered, or relied upon, to support his finding is a capitalization of the net balance of alleged past deficits. * * * If net deficits so

estimated were made a factor in the rate base, recognition of 8 per cent. as a fair return on the continuing investment would imply substantially a guarantee by the community that the investor will net on his investment ultimately a return of 8 per cent. yearly, with interest compounded on deferred payments. * * *

The fact that a utility may reach financial success only in time or not at all, is a reason for allowing a liberal return on the money invested in the enterprise; but it does not make past losses an element to be considered in deciding what the base value is and whether the rate is confiscatory. A company which has failed to secure from year to year sufficient earnings to keep the investment unimpaired and to pay a fair return, whether its failure was the result of imprudence in engaging in the enterprise or of errors in management, or of omission to exact proper prices for its output, cannot erect out of past deficits a legal basis for holding confiscatory for the future, rates which would, on the basis of present reproduction value, otherwise be compensatory. * * *

In determining the value of a business as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances. Omaha v. Omaha Water Co., 218 U. S. 180, 202, 203, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084. * * * And they, like past losses, should be considered in determining whether a rate charged by a public utility is reasonable. Compare Venner v. Urbana Waterworks (C. C.) 174 F. 348, 352. But in determining whether a rate is confiscatory, good will and franchise value were excluded from the base value in Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 669, 32 S. Ct. 389, 56 L. Ed. 594, and Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 169, 35 S. Ct. 811, 59 L. Ed. 1244. * * * Going concern value and development cost, in the sense in which the master used these terms are not to be included in the base value for the purpose of determining whether a rate is confiscatory. * * *

Second. Concerning deductions to be made from gross revenue in order to determine net earnings, the court differed from the master in regard both to the yearly charge for maintenance and to the depreciation annuity. It appeared that in the 15 years since appellant acquired the system in 1905, the average annual expenditure for maintenance had been $42,771; that during the war the property had been admittedly undermaintained; that the expenditure was $64,108 in the calendar year 1919, $80,322 in the fiscal year ending June 30, 1920, and $90,861.28 in the calendar year 1920. The court estimated the proper charge for current maintenance at $70,000, and allowed, in addition, a depreciation annuity of $45,245 (that is, 4 per cent. on property subject to depreciation) to provide a fund out of which annual replacements and renewals could be made. Thus the court allowed for the year's depreciation and maintenance $115,245, which is nearly 14 per cent. of the historical reproduction value, and about 10 per cent. of the assumed reproduction cost, of the depreciable part of the system. The master allowed $147,-

146.40 for maintenance and depreciation during the year ending June 30, 1920. This larger figure was arrived at, partly by charging as cost of maintenance the full $80,322 expended during that year, and partly by including as depreciable property expenditures for overhead items which the court excluded. The proper annual charge for maintenance is the amount normally required for that purpose during the period; it is not necessarily the amount actually expended within the year. Many items included in the overhead cost of original construction may properly be excluded in calculating the amount of the depreciation annuity. We cannot say that the court erred in limiting the year's maintenance and depreciation allowances to an aggregate of $115,245.

The company asked to have allowed as a further charge $29,500 a year on account of what it called deferred maintenance. The contention is that during the war and two years following, the company had deferred maintenance, pursuant to a policy established at the express request of the government, to the end that material and labor might be released for war purposes; that to make good this deferred maintenance would cost $197,000; and that in order to amortize this amount an annual allowance from earnings of $29,500 should be made for five years. This is an attempt, in another form, to capitalize alleged past losses; and the request was properly refused both by the master and the court.

Third. The remaining item as to which the master and the court differed relates to the income tax. The company assigns as error that the master allowed, but the court disallowed, as a part of the operating expenses for the year ending June 30, 1920, the sum of $16,254 paid by the company during that year for federal income taxes. * * * In calculating whether the 5-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and federal taxes or between income taxes and others. But the fact that it is the federal corporate income tax for which deduction is made, must be taken into consideration in determining what rate of return shall be deemed fair. For under section 216 the stockholder does not include in the income on which the normal federal tax is payable dividends received from the corporation. This tax exemption is therefore, in effect, part of the return on the investment.

It is thus clear that both in the year ending June 30, 1920, and in the calendar year 1920, the net earnings of the system were less than 8 per cent. of its value, whether the value be estimated on the basis of prudent investment or on the basis of the reproduction cost actually adopted. When the court rendered its decision the ordinance had been tested for more than a year and a half—a period ample in ordinary times to test the current effect of the rate prescribed and to indicate its probable effect in the near future. The times here involved were, however, in a high degree abnormal. It did not follow that, because the system had earned less than 8 per cent. in 1919 and in 1920, that it would earn less than 8 per cent. in 1921. A rate ordinance invalid when adopted may later

become valid, just as an ordinance valid when made may become invalid by change in conditions. * * *

The District Judge was obliged to form an opinion as to the probable net earnings in the future. All relevant facts, except as stated, and all applicable arguments were fully and clearly presented by the parties and were carefully considered by the court. * * * On the elements to be considered in determining whether the rate would be confiscatory no error was made which could substantially affect the result. His determination whether the prescribed rate would be confiscatory was necessarily based largely on a prophecy, for normal condition had not been restored. He found that gross revenues were steadily increasing; and that they were larger under the 5-cent fare than they had been during the preceding year when the 6-cent rate was in effect. He was convinced that operating costs would decrease largely during the year. His two opinions show that every element upon which his prophecy should be based received careful consideration. We cannot say that the evidence compelled a conviction that the rate would prove inadequate. * * *

The occasion for the suit was solely the extraordinary rise in prices incident to the war. There was no suggestion that the action of the board evidenced hostility to the utility, or that the board was arbitrary or hasty. It had been theretofore considerate of the company's rights and needs. When prices rose rapidly in 1918, it raised the fare limit to 6 cents, although the franchise ordinance prescribed the 5-cent fare. And this was before our decision in San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 41 S. Ct. 428, 65 L. Ed. 777. Its reduction of the fare by ordinance of June 5, 1919, was made after hearing, and was doubtless due to the conviction, shared by many, that, with the cessation of hostilities and the negotiation of the Peace Treaty, prices and operating cost would fall abruptly. This prophecy, if such there was, proved false. But nearly three years have elapsed since the board adopted the ordinance; and more than a year since entry of the decree below. We know judicially that the period has, in general, been one of continuous price recession, and that the current rates of return on capital are much lower than they then were. But we cannot know to what extent the important changes occurring have affected either gross revenues or the net return. There is no reason to believe that the board would not give full and fair consideration to a proposed change in rate if application were now made to it. And the District Judge stated in his opinion (272 F. 147), that the decree to be entered would be vacated or amended in case it should later appear that the regulating board declined such adjustment of rates as the actual experience of the utility might show it entitled to; and the decree was thereupon entered without prejudice.

The District Judge refused a temporary injunction and did not exact a bond. Hence the only relief we can grant is such as operates in futuro. * * * An injunction should not issue now, unless conditions are such that the prescribed rate is confiscatory. As by the reservation in the decree appellant may secure protection against the ordinance if under ex-

isting conditions the 5-cent rate appears to be inadequate, the decree should be affirmed. * * *

Decree affirmed.

SECTION 4.—LOSSES

An allowance for losses arising in previous years may be amortized in the operating expenses only if the losses were the direct result of rates established by the commission and a petition for relief in the nature of higher rates was filed as soon as possible under the state law. In this connection many state laws do not permit the utility to bring a rate case oftener than once in three years.

A small annual allowance for bad debts is permissible, providing the losses do not result from carelessness. With the right to demand prepayment deposits, or to cut off the service for nonpayment, any allowance for bad debts must be relatively small.

SECTION 5.—INTEREST ITEMS

All interest items are excluded from the operating expenses of a utility. The reason is apparent. Presumably borrowed money is used to purchase plant or equipment. Inasmuch as the utility is entitled to a fair return on the fair value of all the utility property, the interest must be paid out of the return. Otherwise the consumer would be compelled to pay both a return on property purchased with borrowed money and the interest paid to the bondholder. Generally speaking, bond discount, brokers' fees, and costs of advertising bond issues are properly treated as interest charges. These items, with interest, reflect truly the complete cost of borrowed money.

Taxes, both property and income, are properly included in the operating expenses. However, incomes taxes paid by the utility in order to render the bond interest tax free is merely additional interest. It is paid by the utility to make the bonds more attractive to the purchaser.

SECTION 6.—CONTRACTS WITH RELATED COMPANIES

Many parent companies render certain services directly or indirectly to their subsidiary companies. For these services they usually exact a so-called "management fee." Such a fee is customarily based upon a percentage of the gross revenue of the subsidiary. In such cases the operating company, being a subsidiary, has little or nothing to say concerning the amount which it is willing to pay for the services received. For this reason the courts have said that items for management fees deserve close scrutiny. The courts have always held, however, that, unless the evidence indicates bad faith or an excessive charge, the charge forms a legitimate part of the operating expenses. The aid given by the parent or related company usually consists of financial, engineering, accounting, purchasing, and managerial aid. Financial help is properly an interest charge, and should not find its way into operating expenses. The portion of the charge for engineering help is in reality part of construction costs, and should also be eliminated. With these exceptions, the charges seem to be proper operating costs.

CHAPTER 3

RATE BASE

SECTION 1.—VALUATION

The second step in the process of establishing a reasonable charge for utility service consists of finding the rate base. The rate base is found by arriving at the fair value of all property, both tangible and intangible, which is either used or useful in serving the public. The problems involved in finding the rate base are: (1) Obtaining a complete inventory of all tangible property; (2) arriving at the unit price to be applied to the inventory; (3) ascertaining the amount of construction overheads to be added; (4) determining the amount of accrued depreciation at the time of the hearing; (5) estimating the amount of working capital required; and (6) figuring the allowance to be made for intangibles.

SECTION 2. —TANGIBLE PROPERTY

Only that tangible property which is either used or useful in rendering service to the consumers may be included in the inventory. This rule excludes property which is leased to another utility, real estate owned, but as yet unused by the utility, and property used in nonutility enterprises. Within this last group fall mines, timber land, and retail departments. As shown later, valuation is not based on cost. Therefore any enterprise which reduces the cost of construction benefits the stockholder, and not the consumer. For this reason mines and timber land may not be included. Retail departments are sometimes included, where it is difficult to distinguish the costs of the department from other utility expenses.

Property which has been constructed at the cost of the consumer, in order to entitle him to service, should not be included in the rate base. To illustrate: A farmer may be called upon to build a short transmission line before the company will furnish him with electric energy. The transmission line is then turned over to the utility, with the understanding that it is to be maintained by them. In determining a reasonable

rate for such service, it would be unfair to include a return on the value of the transmission line.

Stand-by equipment—property not regularly used, but which is maintained ready for use in the event of an emergency or exceptionally heavy peak load—may be included in the inventory. Under this heading utilities are often prone to list obsolete property which has not been scrapped. If such property is maintained in operating condition, and there is a possibility of a demand being made upon it, the commissions hold that it must be given some value.

Although leased property may not be included in the inventory of the lessor, it may be included by the lessee in a valuation of its plant. In such cases the rental is ignored as an operating expense, and a return is allowed on the value of the property.

SECTION 3.—REPRODUCTION VERSUS ORIGINAL COST

The physical property found in the inventory must next be valued. Unit prices must be applied to the individual units of the property. Beginning in 1898 with the case of Smyth v. Ames,[1] there has raged a continuous battle between the interested parties over the method to be used in arriving at value. The Supreme Court of the United States in the case mentioned laid down the following rule:

"The original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the company under particular rates prescribed by statute, and the sum required to pay operating expenses, * * * are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return on the value of that which it employs for public convenience."

Since the above rule was enunciated, the courts and commissions have eliminated from consideration all of the factors mentioned with the exception of two, namely, original cost and reproduction cost. Subsequent cases have practically committed the Supreme Court of United States to the doctrine of reproduction cost, although it appears that slight weight may still be given to original cost. This is customarily done by the application of average unit prices to the inventory. Reproduction cost is thus found by taking the average cost of the various units for three or five years preceding the date of the hearing, and

1 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

applying those costs to the units found in the inventory. This gives the cost to reproduce the identical plant which is used in serving the public rather than one which is capable of rendering the same service. The courts have held that it is the plant in operation upon which a return must be allowed.

Strict reproduction cost is not applied in one particular. Where the physical conditions surrounding the original construction have been altered, the value is ascertained by the cost to reproduce the plant under its original setting. To illustrate: A water company is asking for a valuation of its plant. Various mains were laid and later covered by city pavements. In estimating the cost to reproduce these mains, the cost of cutting through the pavement is not considered. However, if the mains were installed after the pavement was laid, the cost of cutting through the pavement would form a proper item of cost.

STATE OF MISSOURI ex rel. SOUTHWESTERN BELL TELEPHONE CO. v. PUBLIC SERVICE COMMISSION OF MISSOURI et al.

Supreme Court of the United States, 1923. 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807.

Mr. Justice McREYNOLDS delivered the opinion of the court.

The Supreme Court of Missouri (233 S. W. 425) affirmed a judgment of the Cole county circuit court, which sustained an order of the Public Service Commission of Missouri, effective December 1, 1919. That order undertook to reduce rates for exchange service and to abolish the installation and moving charges theretofore demanded by plaintiff in error. It is challenged as confiscatory and in conflict with the Fourteenth Amendment. * * *

August 4, 1919, the commission directed plaintiff in error to show why exchange service rates and charges for installation and moving as fixed by the Postmaster General should be continued. After a hearing, it made an elaborate report and directed that the service rates should be reduced and the charges discontinued.

The company produced voluminous evidence, including its books, to establish the value of its property dedicated to public use. The books showed that the actual cost of "total plant, supplies, equipment, and working capital" amounted to $22,888,943. Its engineers estimated the reproduction cost new as of June 30, 1919, thus: Physical telephone property, $28,454,488; working capital, $1,051,564; establishing business, $5,594,816; total $35,100,868. They also estimated existing values (after allowing depreciation) upon the same date: Physical telephone property, $24,709,295; working capital, $1,051,564; establishing business, $5,594,816; total, $31,355,675.

The only evidence offered in opposition to values claimed by the company were appraisals of its property at St. Louis, Caruthersville, and

Springfield, respectively, as of December, 1913, February, 1914, and September, 1916, prepared by the commission's engineers and accountants, together with statements showing actual costs of additions subsequent to those dates. * * *

Obviously, the commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914, and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum.

In Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 52, 29 S. Ct. 192, 195, 200 (53 L. Ed. 382, 48 L. R. A. [N. S.] 1134, 15 Ann. Cas. 1034), this court said: "There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * * * And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase."

In the Minnesota Rate Cases, 230 U. S. 352, 454, 33 S. Ct. 729, 762 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18), this was said: "The making of a just return for the use of the property involves the recognition of its fair value, if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." * * *

It is impossible to ascertain what will amount to a fair return upon properties devoted to public service, without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day.

Witnesses for the company asserted—and there was no substantial evidence to the contrary—that, excluding cost of establishing the business, the property was worth at least 25 per cent. more than the commission's estimates, and we think the proof shows that, for the purposes of the present case, the valuation should be at least $25,000,000.

After disallowing an actual expenditure of $174,048.60 for rentals and services by the American Telephone & Telegraph Company and some other items not presently important, the commission estimated the annual net profits on operations available for depreciation and return as $2,828,617.60—approximately 11⅓ per cent. of $25,000,000. That 6 per cent. should be allowed for depreciation appears to be accepted by the commission. Deducting this would leave a possible 5⅓ per cent. return upon the minimum value of the property, which is wholly inadequate, considering the character of the investment and interest rates then prevailing.

The important item of expense disallowed by the commission—$174,048.60—is 55 per cent. of the 4½ per cent. of gross revenues paid by plaintiff in error to the American Telephone & Telegraph Company as rents for receivers, transmitters, induction coils, etc., and for licenses and services under the customary form of contract between the latter company and its subsidiaries. Four and one-half per cent. is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership.

The applicable general rule is well expressed in States Public Utilities Commission ex rel. Springfield v. Springfield Gas & Electric Co., 291 Ill. 209, 234, 125 N. E. 891, 901: "The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the corporate officers." See Interstate Commerce Commission v. Chicago Great Western Railway Co., 209 U. S. 108, 28 S. Ct. 493, 52 L. Ed. 705. * * *

Reversed.

Mr. Justice BRANDEIS, with whom Mr. Justice HOLMES concurs.

I concur in the judgment of reversal. But I do so on the ground that the order of the state commission prevents the utility from earning a fair return on the amount prudently invested[2] in it. Thus, I differ fundamentally from my brethren concerning the rule to be applied in determining whether a prescribed rate is confiscatory. The court, adhering to the so-called rule of Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819, and further defining it, declares that what is termed value must be ascertained by giving weight, among other things, to estimates of what it would cost to reproduce the property at the time of the rate hearing.

The so-called rule of Smyth v. Ames is, in my opinion, legally and economically unsound. The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return. Thus it sets the limit to the power of the state to regulate rates. * * *

[2] The term "prudent investment" is not used in a critical sense. There should not be excluded, from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable. His company is the substitute for the state in the performance of the public service, thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes, not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor, the allowance for risk incurred, and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined.

To decide whether a proposed rate is confiscatory the tribunal must determine both what sum would be earned under it and whether that sum would be a fair return. The decision involves ordinarily the making of four subsidiary ones:

(1) What the gross earnings from operating the utility under the rate in controversy would be. (A prediction.)

(2) What the operating expenses and charges, while so operating, would be. (A prediction.)

(3) The rate base; that is, what the amount is on which a return should be earned. (Under Smyth v. Ames, an opinion, largely.)

(4) What rate of return should be deemed fair. (An opinion, largely.)

A decision that a rate is confiscatory (or compensatory) is thus the resultant of four subsidiary determinations. Each of the four involves forming a judgment, as distinguished from ascertaining facts; and as to each factor there is usually room for difference in judgment. But the first two factors do not ordinarily present serious difficulties. The doubts and uncertainties incident to prophecy, which affect them, can often be resolved by a test period. * * * The doubts and uncertainties incident to the last two factors can be eliminated, or lessened, only by redefining the rate base, called value, and the measure of fairness in return, now applied under the rule of Smyth v. Ames. The experience of the 25 years since that case was decided has demonstrated that the rule there enunciated is delusive. In the attempt to apply it insuperable obstacles have been encountered. It has failed to afford adequate protection either to capital or to the public. It leaves open the door to grave injustice. To give to capital embarked in public utilities the protection guaranteed by the Constitution, and to secure for the public reasonable rates, it is essential that the rate base be definite, stable, and readily ascertainable, and that the percentage to be earned on the rate base be measured by the cost, or charge, of the capital employed in the enterprise. It is consistent with the federal Constitution for this court now to lay down a rule which will establish such a rate base and such a measure of the rate of return deemed fair. In my opinion, it should do so.

The rule of Smyth v. Ames sets the laborious and baffling task of finding the present value of the utility. It is impossible to find an ex-

change value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. Nor can the present value of the utility be determined by capitalizing its net earnings, since the earnings are determined, in large measure, by the rate which the company will be permitted to charge, and thus the vicious circle would be encountered. So, under the rule of Smyth v. Ames, it is usually sought to prove the present value of a utility by ascertaining what it actually cost to construct and install it, or by estimating what it should have cost, or by estimating what it would cost to reproduce or to replace it. To this end an enumeration is made of the component elements of the utility, tangible and intangible; then the actual, or the proper, cost of producing, or of reproducing, each part is sought; and finally it is estimated how much less than the new each part, or the whole, is worth. That is, the depreciation is estimated. Obviously each step in the process of estimating the cost of reproduction, or replacement, involves forming an opinion, or exercising judgment, as distinguished from merely ascertaining facts. And this is true, also, of each step in the process of estimating how much less the existing plant is worth than if it were new. There is another potent reason why, under the rule of Smyth v. Ames, the room for difference in opinion as to the present value of a utility is so wide. The rule does not measure the present value either by what the utility cost to produce, or by what it should have cost, or by what it would cost to reproduce, or to replace it. Under that rule the tribunal is directed, in forming its judgment, to take into consideration all those and also other elements, called relevant facts.

Obviously, "value" cannot be a composite of all these elements. Nor can it be arrived at on all these bases. They are very different, and must, when applied in a particular case, lead to widely different results. The rule of Smyth v. Ames, as interpreted and applied, means merely that all must be considered. What, if any, weight shall be given to any one, must practically rest in the judicial discretion of the tribunal which makes the determination. Whether a desired result is reached may depend upon how any one of many elements is treated. It is true that the decision is usually rested largely upon records of financial transactions, on statistics and calculations. But as stated in Louisville v. Cumberland Telegraph & Telephone Co., 225 U. S. 430, 436, 32 S. Ct. 741, 742 (56 L. Ed. 1151) "every figure * * * that we have set down with delusive exactness" is "speculative." * * *

At first reproduction cost was welcomed by commissions as evidence of present value. Perhaps it was because the estimates then indicated values lower than the actual cost of installation; for, even after the price level had begun to rise, improved machinery and new devices tended for some years to reduce construction costs. Evidence of reproduction costs was certainly welcomed, because it seemed to offer a reliable means for performing the difficult task of fixing, in obedience to Smyth v. Ames, the value of a new species of property to which the old tests—selling price or net earnings—were not applicable. The engineer spoke in figures—a language implying certitude. His estimates seemed to

be free of the infirmities which had stamped as untrustworthy the opinion evidence of experts common in condemnation cases. Thus, for some time, replacement cost, on the basis of prices prevailing at the date of the valuation, was often adopted by state commissions as the standard for fixing the rate base. But gradually it came to be realized that the definiteness of the engineer's calculations was delusive, that they rested upon shifting theories, and that their estimates varied so widely as to intensify, rather than to allay doubts. * * *

What is now termed the prudent investment is, in essence, the same thing as that which the court has always sought to protect in using the term present value. Twenty-five years ago, when Smyth v. Ames was decided, it was impossible to ascertain with accuracy, in respect to most of the utilities, in most of the states in which rate controversies arose, what it cost in money to establish the utility; or what the money cost with which the utility was established; or what income had been earned by it; or how the income had been expended. It was, therefore, not feasible, then, to adopt, as the rate base, the amount properly invested or, as the rate of fair return, the amount of the capital charge. Now the situation is fundamentally different. These amounts are, now, readily ascertainable in respect to a large, and rapidly increasing, proportion of the utilities. The change in this respect is due to the enlargement, meanwhile, of the powers and functions of state utility commissions. The issue of securities is now, and for many years has been, under the control of commissions, in the leading states. Hence the amount of capital raised (since the conferring of these powers) and its cost are definitely known, through current supervision and prescribed accounts, supplemented by inspection of the commission's engineering force. Like knowledge concerning the investment of that part of the capital raised and expended before these broad functions were exercised by the utility commissions has been secured, in many cases, through investigations undertaken later, in connection with the issue of new securities or the regulation of rates. The amount and disposition of current earnings of all the companies are also known. It is, therefore, feasible now to adopt as the measure of a compensatory rate—the annual cost, or charge, of the capital prudently invested in the utility. And, hence, it should be done.[3] * * *

[3] See, also, Waukesha Gas & Electric Co. v. Railroad Commission of Wisconsin, 181 Wis. 281, 194 N. W. 846 (1923) on the proposition that cost of reproduction new less depreciation, though to be considered, is not entitled to controlling or even considerable weight in determining present fair value of property for rate making purposes; and that controlling weight should be given the investment cost when investment was prudently made.

SECTION 4.—OVERHEADS

After the inventory is completed, and the proper price for each article included therein has been applied, certain overhead construction costs, which cannot be allocated to the individual items, must be added. The following items are considered by commissions and courts as legitimate overhead costs: Omissions and contingencies; engineering and superintendence during construction; interest, taxes, and insurance during construction; and promotion and organization expense, which may include legal fees, early administrative expenses, training of employees, and incorporation costs, as well as something for the idea of the promoter. No definite method has been prescribed for applying these overheads. At times one percentage of the cost of the plant is used for all of the items, while at other times a percentage is allotted to each element of the overheads. The total percentage usually ranges from 12 to 20 per cent. of the fair value of the property.

The cost of financing the utility—obtaining sufficient capital to purchase the necessary plant and equipment—has been definitely excluded by both courts and commissions. Inasmuch as the cost of financing depends so largely upon the credit of the promoters, and because the discount on bonds is an interest charge, the item is logically omitted.

An allowance for overheads must be made, although the original promoter apparently spent nothing for them. Even though the chief stockholder of a utility may have acted as his promoter, attorney, and engineer, and may have invested only his own funds, the courts hold that overheads form a proper part of reproduction cost. The same appears to be true of overheads which have been recouped by charging such items to operating expenses. This is one of the most serious objections to the inclusion of overheads. Many of them are incurred from time to time during piecemeal construction, and are charged into the yearly operating expenses. At the time of a valuation, these same expenditures, this time in the form of estimated overheads, find their way into the rate-making process.

BOISE ARTESIAN WATER CO. v. PUBLIC UTILITIES COMMISSION et al. (BOISE CITY, Intervener).

Supreme Court of Idaho, 1925. 40 Idaho, 690, 236 P. 525.

Right of Appeal.

Wm. E. Lee, J. This is an appeal from an order of the Public Utilities Commission. The order was made and filed August 18, 1923, and fixed the value of the property of the Boise Artesian Water Com-

pany for rate-making purposes. Application for rehearing was thereafter made and denied, and the company appealed. * * *

Method of Valuation.

The first and probably the principal contention of the company is that the commission did not value its property as of the date of the inquiry, and that it failed to recognize or even give fair consideration to the cost of reproduction. A finding of the fair value of the property of a public utility, used and useful in the service of the public, is authorized by law (C. S. § 2471), and is a necessary requisite to the fixing of a rate that will pay the necessary operating expenses of the utility, take care of depreciation, and pay a fair return on the value of the property devoted to public use, as well as protect the public from paying unreasonable charges for the service furnished.

The determination of the value of the property of a utility is not without difficulty, and no rule should be laid down that would prevent the Commission from giving due consideration to all evidence relating to value, and from finding a fair and just value based on all the evidence. To say that the value of the property of a utility is to be determined solely by subtracting depreciation from what the property originally cost would not be fair either to the utility or to the public. The property may have cost too much. It may have been purchased at an inflated value. On the other hand, it may be too low a value in view of the advance in prices. By some the theory has been advanced that value should be determined from outstanding stocks and bonds, and such a method might be proper in some cases, but, in view of the fact that little restriction has heretofore been generally exercised to prevent the issue of "watered stock," it would be eminently unfair to require users to pay a return on value based solely on outstanding stocks and bonds. The Michigan Commission devised the prudent investment theory (P. U. R. 1923E, 661, 292 F. 139), but a federal district judge enjoined the rates fixed by the Commission. Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission et al. (D. C.) 292 F. 139. In Missouri ex rel. S. W. Bell Telephone Co. v. Public Serv. Com., 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807, Mr. Justice Brandeis advanced the prudent investment theory, in which Mr. Justice Holmes concurred; and, however convincing his argument may seem, Judge Brandeis was unable to prevail on the Supreme Court of the United States to concur in his view. Many of the courts and commissions have approved valuations based on cost of reproduction less depreciation, as was done by this court in Murray v. Public Utilities Comm., 27 Idaho, 603, 150 P. 47, L. R. A. 1916F, 756. * * *

Field and General Overheads.

The commission failed to include in the total value any sum for field and general overheads. Other than the estimates of the engineers, and they all say such a value exists in the property, there was no evidence that, in the construction of the system, any definite sums had been actually expended for overheads. The Commission refused to allow any

amount for such overheads, on the ground that, in order to justify an allowance for overheads, it must be established that the amount claimed is reasonable, and that it had actually been paid as an ownership matter. An unreasonable amount should certainly never be allowed for overheads. Appellant says "that it was actually paid, as an ownership matter * * * is not controlling."

The Supreme Court of the United States in the very late decision in Ohio Utilities v. Public Utilities Commission of Ohio [267 U. S. 359], 45 S. Ct. 259, 69 L. Ed. 656, in speaking of a reduction made by the Commission in items covering expense of preliminary organization, said: "The item of $5,000 seems to have been rejected upon the ground that there was no proof of actual expenditure. Reproduction value, however, is not a matter of outlay, but of estimate, and should include a reasonable allowance for organization and other overhead charges that necessarily would be incurred in reproducing the utility. In estimating what reasonably would be required for such purposes, proof of actual expenditures originally made, while it would be helpful, is not indispensable. * * * That such expenditures in a substantial amount would necessarily be made in reproducing the utility is clear; it is not suggested that the estimate of the engineers is excessive or unfairly made, and the rejection of the entire amount cannot be regarded as otherwise than arbitrary."

The city concedes that such a value is inherent in a utility property, and that, while an allowance for overheads should be made in fixing a value for condemnation, none should be made in fixing a value for rate making. The distinction does not appeal to us. In both situations it is the property of the company with respect to which a value is to be determined. The public can no more take private property without just compensation, by fixing too low a value for rate making, than by fixing too low a value for condemnation. As was said by Mr. Justice Hughes, in the Minnesota Rate Case, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18: "The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

The value of a property is not necessarily its cost. Even though constructed economically the construction cost is a mere evidence of value. The fact, even if it be admitted, that the system was largely built from profits, would not deprive the owner of his right to have the property given its present fair value. And ordinarily, even though the system was built up gradually and out of the profits of the company, and conceding that there is no evidence that any sum was ever actually expended for overheads, we do know that there is a value in the completed property in addition to the mere naked cost of labor and materials necessarily used in its construction. The unsatisfactory nature of theoretical estimates may be conceded, but that better evidence is unobtainable in some cases there can be no doubt. * * *

Interest During Construction.

That, during the construction of such a property, there is a period during which certain funds of the owner are not producing a return cannot be successfully contradicted. In arriving at the value of the property of a public utility, it is proper to include as an element thereof a sum for interest during construction. That it is difficult to determine the reasonable amount that should be allowed is no reason for a failure to make any allowance whatever. Such an allowance has heretofore been made by our Commission, as well as other Commissions, and we believe that it is a general policy to allow an amount for interest during construction. What we have said under the subject of "Overheads" also applies to this item.

Working Capital.

The Commission made an allowance for working capital of $24,000, and appellant contends that this amount is at least $10,000 under its requirements. There does not appear to be any well-defined rule by which the amount necessary for working capital can be ascertained. The requirements differ with different utilities. The amount that should be required for the working capital of a utility is peculiarly within the province of the Commission, and a study of the past and present requirements of the company should enable the Commission to fix a proper amount therefor. Appellant suggests that it is possible that a typographical error was made by the Commission in writing the amount $24,000 instead of $34,000. That such an error occurred, in view of what was said by the Commission in its order bearing on the question, is within the range of possibilities. However, in view of all the evidence, we are not prepared to say that the finding of the Commission is not sustained. The company is entitled to a sufficient allowance to meet its requirements in this respect; and, in view of a possible doubt as to whether such an error was made, a re-examination of the question should be made by the Commission, and such an amount allowed as may be found necessary.

Going Concern Value.

In addition to the allowances of value represented by the term business and property development, the company contends that, in arriving at the value of its property, the Commission failed to make any allowance to cover the going concern value of the utility, and that the system, being in successful operation, has a going concern value that should be included in the total value found to exist. Because of the condition of this water system, as found by the Commission, we believe it has an additional value because of the fact that it is a successful going concern. Going concern value has been treated differently by different courts; it has been allowed in some cases and denied in others.

For the decision of the question we are not without authority. In Murray v. Public Utilities Commission, supra, the court said: "If evidence is offered to show that certain expenses have been incurred in

building up the business, then this may be considered by the Commission as one of the elements under the head of 'Going Concern Value.' Further than this, we are of the opinion that the Commission should not attempt to calculate or segregate any specific theoretical value which attaches to the plant or system of the petitioner, by reason of the fact that it is a going concern, but that this fact should be considered in estimating the value of the physical property and assets of the petitioner. In other words, the question as to the value of petitioner's property and investment should be treated, and viewed, by witnesses and by the Commission, in the light of the fact that the petitioner's plant and system are a going concern; that they are in actual, successful operation."

What the company has a right to demand is that its property, devoted to the service of supplying water to the inhabitants of Boise, be given such a fair value that a reasonable rate of payment by the users, based on such fair value, will give the company a fair return for the use of its property. In determining that fair value, the Commission must keep in mind the fact that the utility is a going concern, and that it is in successful operation. If this is done, there will be, in the total value found to exist in the property of the utility, an allowance for going concern value. Having held that the property of the company was not given its present fair value, we will not attempt to determine whether, in estimating the value of the physical property of the company, the fact that the utility was a successful going concern was taken into consideration by the Commission. The duty of the Commission in this respect, however, is clearly set forth in the Murray Case. * * *

The order appealed from is set aside.

SECTION 5.—ACCRUED DEPRECIATION

The utility is entitled to a fair return on the fair value of the property at the time of the rate hearing. The fair value at that date is ascertained by determining the reproduction cost new and deducting therefrom the accrued depreciation. Four possible methods for determining accrued depreciation have been suggested by the courts and commissions. The simplest, and perhaps the fairest, method is to deduct the amount of the reserve which has been built up by the charges to operating expenses. This method the courts refuse to follow, because the amount of the reserve may have absolutely no bearing on value. It may amount to more than the depreciation that has actually accrued, or it may be much less, depending upon the accuracy with which the management has estimated the normal life of its plant.

The second method is much like the first, except that the engineers who are attempting to fix the value of the property disregard the reserve and make their own application of normal life tables to the par-

ticular plant. This method is faulty, in that it fails to consider the standard of maintenance and the peculiar operating conditions under which the property has been used. For these reasons the courts have also rejected this method.

The third method, and the one which at present seems to be receiving the greatest consideration from the courts, is to base the accrued depreciation on the amount which it would take to place the property in 100 per cent. operating condition. In other words, the engineer inspects the property and attempts to figure what it would cost to make the property operate as efficiently as if it were new. The defect in this method as has been pointed by some of the courts, is that it confuses value with operating efficiency. The two terms diverge widely in meaning. No one would disregard age and use in purchasing a used automobile and look entirely to its operating condition. The same holds true to a lesser extent with all property.

The fourth method has for its basis an inspection of the property and the application of life tables in the light of an inspection. Such a method gives full weight to all of the factors which should be considered.

IDAHO POWER CO. v. THOMPSON et al.

District Court of the United States, D. Idaho, S. D., 1927. 19 F.(2d) 547.

DIETRICH, District Judge. The suit is brought to enjoin the enforcement of a set of rates for electric service, prescribed by the Public Utilities Commission of Idaho in its Order No. 939, dated February 29, 1924, Record, vol. 1, p. 122. Having taken over several hydroelectric generating plants of smaller competing companies, which went into liquidation, plaintiff has further developed them and united them into a single system, from which it distributes electric current for light and power, for heat in cooking and heating water for domestic use, and for power in pumping water for irrigation purposes. Its territory is a small part of Eastern Oregon and the whole of Southwestern and Southern Idaho. * * *

Rate Base.

[In determining the rate base the court takes the fair value of plant as of date of inquiry, computed on reproduction cost, plus going value and working capital, minus depreciation. Rankin, plaintiff's engineer, fixed the reproduction cost at $13,178,318, which was $1,616,627 in excess of the appraisal by Kopelman, the defendants' engineer. As between these two appraisals, the court proceeded to fix the measure of reproduction cost, taking up lands, buildings, equipment, overhead, franchises, water rights, going value, and working capital, separately and in detail.]

* * * * * * * * * * * *

Depreciation.

Plaintiff's position is that as a matter of law there should be no deduction for depreciation, or, if some allowance is to be made, it should not exceed $438,734. Upon the other hand, one of the two witnesses testifying for defendants on the subject estimates depreciation at $3,086,091, and the other at $3,965,785. A problem so complex, and involving so large an amount, merits full consideration.

In the face of its contention that we must capitalize its property at its present fair value, and must deduce such value by inquiring first what it would now cost to reproduce the property new, when we come to adjust this measure to the property as we actually find it, plaintiff urges that we should adopt the theory of value for present use. In other words, because the property is in such state of repair that it is presently capable of rendering substantially the same service as a new plant, nothing should be deducted for depreciation, regardless of its age or the deterioration of any of its parts.

To illustrate: A pole with a normal life of 10 years, costing when installed 9 years ago $25.00, but if now installed new $35.00, we are to capitalize at the latter value, even though it will be worthless at the end of a year. Such a view would set us adrift. Under it the original installation of a used or inferior pole could be capitalized at the same value as a new or durable one, because of its temporary serviceability. If serviceability is to be accepted as having any substantial relation to standard of value, it must be understood as meaning something more than present efficiency or utility. Durability, including cost of upkeep and the need of renewal of parts, is a vital consideration. It may be conceded that the process of depreciation is not necessarily uniform or continuous, and when it has reached a certain stage its effect upon the value of the property as a whole may be neutralized by adequate upkeep and seasonable replacement of parts. It is entirely conceivable that the accrued depreciation of plaintiff's property as a whole is no greater now than it was 5 years ago, and that it will be no greater 5 years in the future. Assuming the useful life of a pole to be 10 years, if plaintiff constructed half of its line 15 years ago and the other half 10 years ago, and 5 years ago renewed the poles first set, and to-day renews the other half, it may very well be said that, everything else being equal, the accrued depreciation is no greater to-day than it was 5 years ago. But as compared with construction wholly new the value of the poles must in either case be depreciated 25 per cent.

And that is the precise question we have here: Not whether plaintiff's property is worth less to-day than it was at some other period of its use, but whether, as it stands, it has the same fair value it would have if it were wholly new. The moment a pole is set in the ground, the process of deterioration begins. To ask us to hold that after it has been subject to such process for a period of 5 years, it is as valuable as a new pole, because it will give service for an additional period without replacement or reinforcement, is to urge us to set aside reason. In

speaking of the general practice in respect to the transmission and distributing units of a system, one of the expert witnesses for the defendants testified that ordinarily such systems, properly maintained, depreciate from the value new to the extent of 20 or 25 per cent., and are permanently held at substantially that level by maintenance and retirements. Whether this is a precisely accurate estimate of percentage we need not determine; but the truth of the general proposition is obvious. Repairs and replacements are not made upon new lines. They are not required until deterioration has advanced to a certain stage, or, owing to lapse of time and changing conditions, a substantial measure of inadequacy or obsolescence has been wrought.

In respect to its automobiles, plaintiff adopts a theory inconsistent with the one it urges for the balance of its property, but more in accord with reason. It computes the probable mileage of the car, and deducts from cost new in proportion to the mileage already used, making reasonable allowance for scrap value. * * *

There remains the important process of relating the cost of the hypothetical new plant to the fair value of the old plant as it actually exists. Fair value implies a consideration of all factors which would be regarded as material in negotiating a sale and purchase of such property. Wear, decay, deterioration, obsolescence, inadequacy, and redundancy would all undoubtedly be considered as factors. It is suggested that obsolescence and inadequacy do not accrue, but occur. But in essence how do they differ from wear and decay? In either case the process is usually gradual, and ultimate withdrawal from use of the affected unit or device is just as abrupt and just as much an occurrence in the one case as in the other. Suppose that in the progress of the art there becomes available a device which is somewhat less expensive and somewhat more efficient than the old, but that the differences are not so great as economically to justify immediate substitution. Can it be said that the value of the old is in no wise impaired by obsolescence, or that in appraising it we could fairly value it at its present cost, when that is in excess of what the new and more efficient device would cost?

So, in respect to inadequacy, changing and growing conditions may be such as to make it appear inevitable that in a short time a unit will become inadequate and must be retired. Would it be contended that, though it may still be adequate, its fair present value could be unaffected by the fact that it must soon be scrapped? We have a concrete illustration: While asserting that from the standpoint of location, design and capacity, the plant is in good condition, plaintiff's manager testifies that it is expected business will grow to such an extent that within the next five years existing power plant units, representing an investment of $500,000, must be retired for inadequacy. If within that short period these units must be scrapped for inadequacy, how can it be said their present fair value is greater than it would be if their physical deterioration had reached such a stage as to make their retirement necessary within the same period?

The extent of such depreciation at any given time is often difficult to determine, but nevertheless it is quite as real as in the case of wear or

decay. Hence reserves, with equalized annual accruals from operating revenue to cover such impairment of value, which takes place gradually, but is given record recognition only from time to time when the depreciation of a unit becomes so complete that it must be retired. Manifestly, if we ignore such impairment, we not only place a value upon the property which it does not in fact possess, but, with accrued reserves fully covering the impairment, we capitalize that which has been constructively withdrawn from use and that for which plaintiff has been fully compensated. * * *

The method pursued and the theory employed are explained by its chief engineer. (Volume 1, pp. 11 to 17 and 37 to 45.) By himself and through his assistants he made a detailed examination, for the purpose of ascertaining what repairs and replacements should be made, either presently or in the immediate future, and the conclusion reached that such repairs and replacements could be made at an aggregate outlay of $438,734 was adopted as the full measure of depreciation. While he states that with this outlay the property could be put into a condition as good as new, or could be made as valuable as new, it is plain from all of his testimony that he had in mind the standard of value now urged by the plaintiff, namely, value for present use—present serviceability or efficiency. For example, we quote (page 37):

"Q. I understood you yesterday to say in respect to that, Mr. Rankin, that it was 97 per cent. of the value it would have if it were entirely new? A. Yes; 97 per cent. as valuable in service. * * * Q. Now one of the simpler units, with which I would be more familiar, transmission line, for instance: When you made this investigation with a view of determining the present value of that unit, as I understand, you went out along the line and examined the structures as you went? A. Yes. Q. Now, if you found a pole five years old—that is, one that had been installed five years—how would you treat that in your inventory and appraisement? A. Unless the pole required reinforcing within a three-year period we considered it the equivalent of a new pole."

When pressed from another angle for an explanation of what he meant in saying that a purchaser would give as much for the existing plant as for a new one, he seems to have made it clear that the mental comparison was of the present system as a going concern with a newly constructed system before business was attached. (Volume 2, p. 45.) But going concern value plaintiff asks to have considered separately as a very substantial factor.

The assistants to this witness, who, in giving their testimony on direct examination, employed substantially the same language, must, though not particularly interrogated, have intended the same qualified meaning.

When analyzed it is clear that plaintiff's estimates are of only a part of the elements that must be taken into account, and, even if accepted as correct in respect to the elements considered, it would furnish an inadequate measure of entire depreciation. That being the case and the determination of the reproduction cost now being futile unless such cost is related to the property as it actually exists by ascertaining and

deducting therefrom the total depreciation, manifestly the plaintiff's case must fail for want of sufficient proof, unless we can resort to other evidence.

The only other direct testimony upon the subject is that of the defendants' witnesses, Kopelman and Fletcher. The objections to their testimony go to its weight rather than its competency. Both are trained engineers, with a considerable experience in valuing public utilities and well informed in respect to the various theories more or less commonly resorted to in making such valuations. While he did not make a detailed inspection for the purpose of appraising the present physical condition of each item of plaintiff's property, from frequent general inspections on the ground and from the history of the system and the records and reports submitted by the plaintiff, Kopelman is familiar with the property as a whole, and has adequate knowledge of the location of all of its various units, their character, approximate age, and general condition. * * *

But, aside from that consideration, the real dispute is not in respect to facts which only a minute inspection upon the ground would disclose. Both of these witnesses expressly concede that the properties are well maintained and in good operating condition. They also concede that as to certain parts of the property there is no appreciable physical deterioration. Plaintiff could scarcely hope that a minute inspection would result in more favorable concessions. The real issue is more fundamental. Plaintiff contends that by the expenditure of $438,734 the properties can be put into an operating condition as good as new, and if any allowance at all is to be made for depreciation it should not exceed this amount. Conceding the premise, but challenging the conclusion, defendants' witnesses assert that there are factors of depreciation which do not affect present operating efficiency, and that in their appraisement minute inspection would be of little if any assistance. See Lyndon, Rate-Making for Public Utilities, pp. 30, 31.

If we again resort to the automobile for a concrete illustration, they in effect say that, owing to considerations wholly extrinsic, a new automobile, though never used and physically unimpaired, may by lapse of time depreciate in value; and, a fortiori, if used, it will lose value, though kept in perfect operating condition, and though many of its parts do not wear or physically deteriorate. Like considerations apply to plaintiff's properties as a whole. In determining this depreciation they adopt substantially the methods used by the plaintiff in depreciating its automobile account. It does not employ an experienced mechanic to take a car to pieces and estimate the measure of wear or deterioration of each part. It resorts to a percentage or straight line standard, based upon an assumed mileage life.

Crude and inaccurate though it may be in specific cases, it is a working rule which in the long run probably approximates reasonable accuracy. The method is not to be withheld from other units of plaintiff's property merely because there is less experience from which to deduce a standard, unless something better can be suggested. If the factors of depreciation urged by defendants are real, we are under the

necessity of measuring them in some way. Undoubtedly plaintiff's automobiles depreciated quite as rapidly in the earlier period of their operation as they do now, but they were not to be carried indefinitely at cost, merely because its experience was insufficient in the earlier years, to warrant satisfactory general deductions of accrued depreciation. Its experience could be supplemented by the experiences of others and the prognosis of those who are qualified by special knowledge in the art. * * *

As suggested in some of the questions, it may be conceded that there is generally little physical deterioration in concrete dams, copper conductors, and glass insulators; like considerations would apply to a building constructed of concrete, with tile roof and floors, and imperishable doors, sash, and casings. But if we assume, without proof, that some of plaintiff's buildings are so constructed, the several classes of property do not constitute the plant. We have already explained the basis upon which plaintiff estimated depreciation in transmission poles: "As good as new," unless decay has advanced to such a stage as to require stubbing within 3 years. This is a large account. We assume the same method was employed in respect to the distribution systems, another large account.

As we understand the record, plaintiff has approximately 40,000 customers, to whom it measures current. Its meter account exceeds $500,000, approximately $370,000 of which was for instruments in existence as far back as 1919. Upon this entire account plaintiff computes a depreciation of $1,362, and that is for "cost of replacing defective meters" only. Is there no wear or deterioration generally in such instruments? Because, after use of 10 years, a watch or clock keeps perfect time, is it as valuable as when new?

Plaintiff fixes a depreciation of only $8,598 (and that for cost only of replacing defective instruments) on its transformers, an account totaling approximately $800,000; $500,000 as long ago as 1919. Upon equipment at approximately 50 substations and transformer stations, aggregating approximately $1,200,000, or approximately $600,000 for such property in the plant in 1919, it computes a depreciation of but little over $12,000.

The office equipment account, while relatively not large (approximately $100,000), is highly illustrative of the theory upon which plaintiff computes depreciation. The number is not given, but there must be many typewriters; in the depreciation account (16–B) frequent reference is made to the need of revarnishing or other repairs of typewriter tables and chairs. But, with the exception of a few cases where overhauling is needed, typewriters are not mentioned. Clearly the theory is that an old typewriter is as valuable as a new one, unless there is immediate need of overhauling, and in such case the difference in value is measured by the cost of overhauling. Of this particular item the lay mind may be assumed to have some intelligent conception, without direct testimony upon the subject. And we must presume that the same rule of appraisement was used in respect to the larger accounts, outside the range of common knowledge, such as power plant equipment, power plant

buildings, fixtures and grounds, aggregating approximately $3,000,000 as early as 1919, and now about $5,000,000.

Weighing all considerations, we estimate depreciation to be $2,000,000. * * *

Rate of Return.

No useful purpose would be subserved by collecting the numerous cases where this subject has had consideration. The general range of allowance has been from 6 to 8 per cent., with comparatively rare instances of higher or lower rates. Each case is to a degree affected by its own distinctive circumstances. In addition to bare compensation, we are, of course, to recognize that there is a measure of risk. In all investments there is risk. It is involved, as well, in mortgage and other loans; otherwise, the private borrower would not have to pay double the rate paid by the government.

Under the circumstances, the element must here be held to be relatively small. The utility serves a wide territory, generally agricultural, with many small urban communities. The basic industries are highly diversified agriculture and stock raising. These are permanent resources; they are not exhausted by use. Water resources for irrigation are apparently abundant, and great investments have been made in the construction of irrigation works. It is immaterial that some of these enterprises may not have been financially feasible, and will entail loss upon the investors. The systems have been constructed, and are enduring resources for use, whatever may ultimately turn out to be their reasonable capitalization.

Electric current has come to be recognized as one of the prime necessities of our modern life, for numerous uses. The experiment in general heating has been unsuccessful, but that is a negligible factor. There is apparently a limit to the economical feasibility of irrigation pumping, but such current as for that reason may be released from that service plaintiff seems confident will be required for other demands more fully compensatory. The bulk of plaintiff's service is to small consumers, for lighting purposes and other multiplying uses in the home, and for many small commercial and individual needs—insuring permanency and freedom from violent fluctuations in aggregate demand; and according to the testimony the expectation is of an expansion along these lines, rather than for purposes more hazardous and uncertain.

The experience of plaintiff's predecessors is without present significance. That was a period of speculative promotion, inadequate financing, duplication, and unrestricted competition. Under the system of public regulation, so long as plaintiff is able and willing to render adequate service, it is protected against competition from a like utility, and desultory competition from other sources can hardly be formidable.

Evidence of the strength and safety of plaintiff's investment under these conditions is found in the experience of the last few years. The territory has passed through or is passing through an unprecedented depression, so notorious as to be a matter of public history, and is referred

to by some of the witnesses in the case. But while farming and stock raising were prostrate, banks in great numbers were closing their doors, and the more substantial business concerns were marking time, the utility was apparently but little affected. Its volume of business grew, and it was able to meet its obligations out of increasing revenue. No deserved credit is withheld from its management, by saying that its basic strength inheres in the fact that it sells for cash a prime necessity, to innumerable small consumers, for a diversity of uses, and that it operates under laws which protect it against the vicissitudes of competition and any popular demand for unremunerative rates. True, there is no technical guaranty of permanent success; but, assuming the feasibility of the enterprise, assurances of the prime favors of such success are very real. Depreciation is compensated, and the possibility of loss through deflation in plant value is counterbalanced by the possibility of inflation; and over against the contingency that for a given period a schedule of rates may in practice yield a return less than what is determined to be reasonable may be set the contingency of an excess.

Small temporary investments or loans are scarcely comparable. Besides, as between the rate paid by the ordinary borrower and the net return to the lender, there is generally a substantial spread. The bank must bear the expense of banking, and in the loan business there are commissions and other expenses, including cost of collecting interest, and generally of service in seeing to it that the security is not jeopardized through waste or defaults in the discharge of taxes and other paramount liens. We are here considering a permanent investment of a very considerable magnitude, and a net return to the investor after every expense is paid, including the costly service of the Bond & Share Company; a net return, too, as to which at least a portion of the burden of federal taxation has been discharged. And, as we have seen, a further consideration, not without substance, is that the return is paid every month, instead of semiannually or annually.

We would have difficulty in believing that, with reasonable assurance of honest and efficient management, an investment of that character, with a 7 per cent. return so paid, would be unattractive. At least we are unable to conclude that under such circumstances rates yielding a return of 7 per cent. or over, so paid, would in any proper sense be confiscatory. * * *

SECTION 6.—WORKING CAPITAL

In addition to the physical property required to serve the public, the utility must possess sufficient working capital to pay the operating expenses until revenues are received. Apparently either of two methods for finding this amount will satisfy the commission. The customary method is the allowance of an amount equal to the operating expenses

for that period of operation before the revenues are received. Usually taxes and depreciation are deducted from operating expenses for this purpose as they are paid at the end of the year. The procedure is sometimes varied by adding the average inventory of supplies. The second method is to use the current assets as shown by the balance sheet of the company and deduct therefrom the current noninterest-bearing liabilities. This permits the use of the actual investment which the company has in working capital.

SECTION 7.—INTANGIBLES

In the group of intangibles are included such items as good will, franchises, going value, contracts, and water rights. Good will is based on the probability that a customer will continue to patronize the same establishment which he has previously patronized. Its value is ordinarily determined by the capitalization of excess earnings. Good will as a factor in utility valuation has been eliminated, because it is the duty of the courts to establish a reasonable rate, and, second, because under monopolistic conditions the consumer has no alternative. If he desires utility service, he must continue "to trade at the old stand."

The value of a franchise obtained from a municipality is universally excluded from the rate base. The reasons are obvious; the franchise is indirectly donated by the consumer, and it possesses value only as unusual profits are earned. There is one exception to the above rule. If the utility has paid a definite sum to the city for the franchise, it may include the amount paid, less a porportional amount for the expired portion of the franchise period.

SECTION 8.—GOING VALUE

Going value is that value which inheres in a plant in successful and harmonious operation, with business developed and customers attached, over one which has never been operated and which has yet to develop a mere potentiality into a successful business. In other words, a plant with business developed, customers attached, and records perfected is worth more than the "bare bones" of the plant. The courts are uniformly agreed that some allowance must be made for these factors, although at present no definite procedure has been outlined for deter-

mining their value. An attempt to measure it by the actual development cost—determined by early losses and lost returns—was cut short by a decision of the Supreme Court of the United States. It was said by this court that early losses offer no evidence of value, and may have resulted from poor management or from premature construction. At present, the most acceptable method for figuring going value is to find the cost of reproducing the business. Two ways of doing this have been suggested: First, determine from book figures the present cost of attaching customers, developing records, and training employees; second, estimate the loss in return during a normal development period. It is not too much to say, however, that at present going value is too often arrived at by taking an arbitrary percentage of the value of the plant.

DES MOINES GAS CO. v. CITY OF DES MOINES et al.

Supreme Court of the United States, 1915. 238 U. S. 153, 35 S. Ct. 811, 59 L. Ed. 1244.

Mr. Justice DAY delivered the opinion of the court.

This suit was begun in the district court of the United States for the southern district of Iowa, by the present appellant, hereinafter called the Gas Company, against the city of Des Moines and others, to enjoin the enforcement of the provisions of a certain ordinance of the city, passed December 27th, 1910, whereby, from and after the 1st day of January, 1911, the rate to be charged and collected for gas in the city of Des Moines was fixed at 90 cents for each thousand cubic feet. The allegations of the bill were that to enforce the ordinance would amount to the taking of the Gas Company's property without just compensation and operate as confiscation of its property, and thereby deprive it of the same without due process of law, and would deny the equal protection of the laws: * * * A temporary injunction was allowed, and after issue made, the case was referred to Robert Sloan, Esquire, as special master in chancery to report his findings of fact and conclusions of law. The master afterwards filed his report, and the same coming on before the district court for hearing, upon exceptions, the report of the master was confirmed, and the bill dismissed "with prejudice." 199 F. 204. From that decree the present appeal is taken. * * *

There is no question of the authority of the city of Des Moines, under the laws of the state, to regulate the rates at which gas shall be furnished to the city of Des Moines and its inhabitants. After valuing the real estate and various items of personal property as hereinafter stated, the master adopted as the only practical way in his judgment of determining the reasonable value of the buildings, their contents, the yard structures and the mains, house and street lamp services and meters, the process of estimating the cost of reproducing them new, and then

estimating the depreciation which should be deducted, in order to obtain their present value. Under this method, the master summed up the value of the property of the Gas Company as follows: * * *

"In my judgment the working capital should not be diminished, and—

The amount allowed is	$ 140,000
To this add real estate	150,000
To organization expenses	6,923
To meters in stock	6,603
Present value of physical property aside from above items	1,937,402
Total physical value	$2,240,928"

What is called in this summary "the present value of physical property" the report shows was arrived at by the master in the manner following: He first found what he thought was the base value of the property, i. e., "what it would cost to produce it at the present time new, without adding thereto any overhead charges." This figure he fixed at $1,975,026. To this he added overhead charges, 15 per cent.—$296,-254. From this he deducted depreciation, $333,878, leaving as the value of the property thus ascertained, $1,937,402.

As appears from the opinion of the court and the arguments of counsel in this case, exceptions to the master's report so far as the Gas Company is concerned pertain principally to [the] question * * * as to his manner of dealing with what is termed the "going value" of the concern. * * *

As we have said, the master was at first disposed to allow $300,000 as a separate item covering the going value of the concern. After stating that he fixed the going value at the sum of $300,000 he says:

"It may be asked upon what basis this amount is determined. The evidence, followed strictly, might require me to make it higher, could my mind rest satisfied that the 'going value' of this concern is worth more, but I cannot feel satisfied that such is the case, and regard $300,000 as every dollar it is worth over and above its physical value, and in my judgment, it is worth that much more than a plant would be that had to develop its business. But that would be much more rapid, in my judgment, than is estimated. I think a purchaser would be willing to add this amount for its developed business, and that a seller would not be willing to sell unless he got that much more than its physical value, but I could not give the mental process by which this conclusion is reached any more than a jury could do so, under like circumstances, but it is nevertheless my judgment under all the evidence in the case.

"The element of 'good will' as applied to the ordinary merchant or manufacturer dealing with the public generally is not considered in estimating the 'going value' of complainant's plant. It cannot be considered in a public utility like the one in question in this case, because the complainant has a monopoly of the business in which it is engaged in the city of Des Moines, and those who desire to use its product must buy of it. They have no choice in the matter. But there is a great difference even in a monopoly which has a business already developed and one that must develop it. The plant of complainant has all its parts

working in harmony, performing their several functions in producing and conveying the gas to its customers. These several parts are not only in place, but have been brought to a harmonious operation throughout. Even the employees of the concern are familiar with their duties and experienced in performing them. But without business, no matter how perfect it may be, it would be unprofitable. It is ready, however, for business, and has the business to transact. It was a small concern at the start in 1864, but its books show that it has had a steady growth for many years in the past, and everything indicates that it will continue in the future. There is great difference between such a plant and one whose business must be developed. All a purchaser of such a plant would have to do would be to take charge of the plant, 'touch the button,' and he is making money from the start. There is no element of uncertainty connected with it.

"He can retain its experienced employees as a rule, should he so desire, at the same wages. There is no question that such a plant has a 'going value,' because it is a money maker from the start.

"The only difficulty is to determine how much its 'going value' is worth. No interest during its construction is allowed, nor anything that is included in the 'overhead charges,' which are part of the physical value. But simply the fact that it has a developed business that will make money for its owner, with reasonable rates allowed for the product which it manufactures and sells."

That "good will," in the sense in which that term is generally used as indicating that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business, has no place in the fixing of valuation for the purpose of rate-making of public service corporations of this character, was established in Willcox v. Consolidated Gas Co., 212 U. S. 19, 52, 53 L. Ed. 382, 399, 48 L. R. A. (N. S.) 1134, 29 S. Ct. Rep. 192, 15 Ann. Cas. 1034. "Going value," or "going concern value," i. e., the value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business, has been the subject of much discussion in rate-making cases before the courts and commissions. Many of those cases are collected in Whitten on Valuation of Public Service Corporations, §§ 550–569, and the supplement to the same work, §§ 1350–1385. That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use. Each case must be controlled by its own circumstances, and the actual question here is: In view of the facts found, and the method of valuation used by him, did the master sufficiently include this element in determining the value of the property of this company for rate-making purposes?

Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced

in the value of its actual physical property. In this case, what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred. The present company and its predecessors had long carried on business in the city of Des Moines, under other ordinances, and at higher rates than the ordinance in question established. For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business.

These items of expense in development are often called overhead charges, for which, as we have already seen, the master allowed 15 per cent. upon the base value (exclusive of real estate) or $296,254, in addition to his allowance of $6,923 for organization expenses. Of these charges the master said:

"In reaching the physical value of the plant in question by the process of reproduction, it is necessary to bear in mind that the present value thereof represents much more than the machinery therein, the labor of installing and constructing them, and putting them in place to perform their various functions, ready for the manufacture and distribution of gas to its customers. Were the city of Des Moines without such a plant, and such a one as the complainant now owns was proposed, it would be found that much more than the mere cost of labor and material would be expended. Such expenditures are termed overhead charges, and are as follows:

"1. Time and money expended in the promotion of the enterprise, in the organization of the company and interesting capital therein, including, also, legal expenses, obtaining the necessary franchise, as well as the costs of incorporating the company.

"2. Then a competent engineer must be employed to prepare the plans and specifications for the plant, and make the necessary surveys, and when the work began, to superintend the construction thereof, and see that it is done properly and according to plans and specifications. The successful operation of the plant depends largely upon its proper construction.

"3. Then losses arising from accidents and injuries to workmen as well as the material during its construction, which is such an amount as the cost of insuring against such losses, which is between 1 and 2 per cent.

"4. Contingencies are such expenditures as arise from the lack of foresight and care preparing the plans and specifications. No matter how careful the engineer may prepare them, such expenditures invariably arise. Mr. Alvord testified that his allowance therefor would depend very much upon his knowledge of the engineer who prepared them, but that no matter who prepared them, they would invariably occur, and an allowance should be made therefor. The careful and

thorough inventory in this case reduces very greatly the allowance therefor.

"5. The cost of administration, which includes the time and money expended by the parties who are engaged in the enterprise, purchasing the material, procuring the money for their payment as needed, and generally superintending the entire enterprise during the construction of the plant.

"6. It is estimated that it would take three years to complete the plant in question, and that at least one half the time and money invested therein would give no return, and that a loss of interest would result therefrom, and that such loss would be included in the overhead charges." * * *

When, as here, a long established and successful plant of this character is valued for rate-making purposes, and the value of the property fixed as the master certifies upon the basis of a plant in successful operation, and overhead charges have been allowed for the items and in the sums already stated, it cannot be said, in view of the facts in this case, that the element of going value has not been given the consideration it deserves, and the appellant's contention in this behalf is not sustained. * * *

Nor do we think there was error in refusing an injunction upon the conclusion reached that a return of 6 per cent. per annum on the valuation would not be confiscatory. This is especially true in view of the fact that the ordinance was attacked before there was opportunity to test its results by actual experience. It is true the master reported that in his opinion the company ought to earn 8 per cent, but he also found that in his judgment gas could be produced for 60 cents per thousand, and the actual effect of the 90-cent rate on an economically managed plant had not had the test of experience.

The decree of the court below is * * * affirmed.

SECTION 9.—CONTRACTS AND WATER RIGHTS

A contract by a local utility to purchase a certain service rather than manufacture it often results in the discarding of a plant. If the existing plant has not been fully depreciated, the contract is given the depreciated value of the plant for rate-making purposes. The contract possesses no additional value, unless it carries terms which are particularly advantageous, and which the wholesale company would be unwilling to include at the time of the hearing. If the latter is true, it may be given such an additional value as is fair to all parties concerned.

Water sites chosen by utilities because of their ideal location possess a certain inherent value. Valuable sites must be given some considera-

tion in arriving at the rate base. The courts have definitely decided that the value of such sites may not be measured by the capitalization of the saving over some alternative method of production. Thus a hydroelectric plant would not have a value dependent on its saving over a steam plant. To value the plant in such a manner would be to deny the residents of a mountainous territory the natural advantages which they might expect to derive therefrom. Perhaps the best method for determining the value of such a site is by comparing it with other sites with a known value. If this is impossible, the commission merely attempts to arrive at an equitable decision, keeping in mind the best interests of all parties.

SECTION 10.—RATE OF RETURN

The Fourteenth Amendment to the Constitution of the United States demands, in order to avoid confiscation, that a utility be paid a fair return on the value of its property. The legislation enacted in the various states merely suggests that the rates must be reasonable. A rate may be unreasonable either because it allows too high or too low a return to the utility. The return allowed to the utility should rest somewhere between the line of confiscation and the upper limit of reasonableness. It usually ranges from six to eight per cent. depending upon the following factors: Risk of the particular enterprise; current interest rate; efficiency of management; public relations; company credit; and attraction of new capital into the field when needed.

NEGOTIABLE INSTRUMENTS

CHAPTER 1

PURPOSE, NATURE, AND FORMS OF COMMERCIAL PAPER

The Negotiable Instruments Act.—Interchange of credit being simpler and less hazardous than actual transfers of money, bills of exchange and promissory notes were invented and are used as symbols and evidence of these credit transactions. From such usages there grew into the body of the common law a set of rules and principles called the law merchant, which in the United States has been codified into the Uniform Negotiable Instruments Act, adopted as part of the statutory law of over forty of the states.

Bills of Exchange.—A bill of exchange is an unconditional order written by one person, called the "drawor," upon another, called the "drawee," directing the drawee to pay to a third person, called the "payee," or his order, a sum of money. Suppose that A, in France, owes B, in England, a thousand dollars, and that B wishes to buy a thousand dollars worth of goods from C, also in France. B writes an order on A, directing him to pay to C one thousand dollars, and sends this written order to C, who presents it to A and secures the money. Thus, by this transfer of credit, both A and B have avoided the trouble and risks incident to the transportation of the money itself.

Furthermore, the bill may pass from hand to hand, to take the place of money for the purchase of goods or the payment of debts, before it is finally discharged by payment by A. C, instead of presenting the bill to A for payment, may transfer his title therein by indorsement and delivery to D, to whom C owes money, and D may do the same to E, and so on until it is finally presented and paid by the drawee, A.

The form of bill of exchange most familiar to every one is the ordinary bank check.

Promissory Notes.—A promissory note is an unconditional promise in writing to pay a specified sum of money to the order of another, or to bearer. The party promising to pay is called the "maker." The party to whose order the promise is made is called the "payee." Like all forms of bills of exchange, promissory notes may circulate as money in payment of debts by means of indorsement.

Difference Between Negotiation and Assignment.—Nonnegotiable instruments are transferred by assignment, not by negotiation.

In an assignment, the person to whom the debt is transferred takes subject to all the defenses which the debtor had against the original creditor. In other words, the assignee gets no better right than his assignor had. The rule is generally stated as follows: *The assignee of a chose in action takes subject to all the equities and defenses that existed against his assignor.*

Example.

Smith bought an automobile from Brown, and gave his nonnegotiable note for $500, payable to Brown. The car was to be delivered to Smith at a later date. Brown did not deliver the car, but indorsed and sold the note to an innocent purchaser, Green, for $450. At maturity, Green sued Smith on the note, and Smith defended on the ground that, since the car was never delivered, he has a full defense to payment of the note. Smith is correct. Had Brown sued, Smith certainly would have this defense; and since Green, Brown's assignee, gets no better title than Brown had, the defense is equally available in this suit by Green.

In order that notes and bills of exchange might be readily transferable, so as to supplement the use of money in the payment of debts, it was necessary to make an exception in their favor from the ordinary rules of assignment above referred to. It was therefore provided that, where the instrument was in proper form and negotiated to a purchaser in good faith, the maker could not set up any defenses he might have in a suit on the note. In other words, a purchaser in good faith of a negotiable instrument takes the instrument free from the defenses of the maker. Thus, in the above example, had the note which Smith signed been negotiable in form, and had Green purchased it in good faith and without knowledge of the fact that the automobile had never been delivered, Green could have recovered the full value of the note from Smith, in spite of the fact that Smith had never received consideration for it.

Only Holder in Due Course Takes Free from Defenses.—It will be observed from the foregoing discussion that the law places certain conditions to the right of a purchaser of a bill or note to recover thereon free from the defenses of the party obligated to pay. The general rule is as follows: *The holder in due course of a negotiable instrument takes the same free from personal defenses of the maker or drawer.*

Requisites of Holder in Due Course.—A holder in due course is one who has taken the instrument under the follow conditions:

(1) That it is negotiable in form;
(2) That he is a holder;
(3) That he is a holder for value;
(4) That he became a holder before maturity; and
(5) That he took the instrument in good faith and without notice of defenses and equities of ownership.

CHAPTER 2

WHO IS A HOLDER IN DUE COURSE?

SECTION 1.—THE INSTRUMENT MUST BE NEGOTIABLE IN FORM

1. In General

Requisites to Negotiability.—An instrument, to be negotiable, must conform to the following requirements:

(1) It must be in writing and signed by the maker or drawer;

(2) Must contain an unconditional promise or order to pay a sum certain in money;

(3) Must be payable on demand, or at a fixed or determinable future time;

(4) Must be payable to order, or to bearer; and

(5) Must designate the parties thereto with reasonable certainty.

2. There Must be a Promise or Order

The instrument must contain a promise or order to pay, or its equivalent. So a receipt, or an I. O. U., or a written acknowledgment of a debt, could not be negotiable. "I authorize you to pay P, or order," could not be negotiable, since it merely confers a privilege of paying and debiting the drawer, but does not impose a duty to do so, as the law requires.

However, if the instrument contains words which imply a promise, it will be sufficient. "Due X $100, payable upon return of this certificate properly indorsed," has been held negotiable; the promise to pay being implied from the word "payable."

3. The Promise or Order Must be Unconditional

Express Conditions.—Where the promise or order is expressly conditioned, there can be no doubt that the instrument is nonnegotiable. Thus any order to pay "subject to," "on condition that," or "if," a certain event happens, as, "Pay A $100, if he delivers deed as per contract," would obviously be a conditional order. Also any order to pay out of a specified fund is conditional, the condition being that there be

that amount of money in the named fund. Whether there is in fact the amount in the fund is immaterial, for the question of negotiability is one of form alone, and is determined solely from the face of the instrument. So, "Pay A $100 out of my checking account," would be conditional and nonnegotiable, though in fact there were many times the amount in the account.

However, an absolute order to pay is not rendered conditional by an indication of a particular account to be charged. So, "Pay A $100 and charge to my checking account," or "on account of repair deposit," are unconditional and negotiable.

Implied Conditions.—Where the note contains on its face a statement of the underlying transaction or contract for which it was given, and it appears therein that the payee has yet to perform some act as a condition precedent to the maker's promise to pay, it may be said that the promise on the note is conditioned by implication from the underlying contract. Thus, where the note states, "This note is given for advertising to be furnished to the maker of this note," or, "This note given for goods, title and possession to be retained by the payee until the note is paid," it is plain that the duty of performance on the part of the payee impliedly conditions the maker's promise to pay.

There is a conflict of authority as to whether these implied conditions render an instrument nonnegotiable. The sole question is whether the word "unconditional," as used in the Negotiable Instruments Act, was meant to include implied as well as express conditions. The weight of authority has answered this question in the affirmative; and a condition to the promise on the note, implied from the statement of an unperformed duty on the part of the payee, is held to render the instrument nonnegotiable.

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4. The Sum to be Paid Must be Certain

When is Sum Certain.—The sum payable is a sum certain, within the meaning of the act, although it is to be paid:

1. With interest; or
2. By stated installments, with a provision that upon default in payment of any installment, or of interest, the whole shall become due; or
3. With exchange, whether at fixed or at current rate; or
4. With costs of collection, or an attorney's fee, in case payment shall not be made at maturity.

Two Different Interest Rates.—A provision that a note shall bear an increased rate of interest, if not paid at maturity, still leaves the sum certain, since the holder can figure the exact amount due on the note for any particular date in the future.

5. The Time of Payment Must be Certain

REASON FOR REQUIREMENT.—In order that commercial paper be suitable for circulation in the money market, it is essential that the parties be able to ascertain at what time the instrument is due and payable.

There are four possible ways to fix the maturity date of a bill or note:

(1) Fixed Date of Maturity.—Instruments payable at a specified date in the future are payable at a time certain, and, as far as the time requirement is concerned, are negotiable.

(2) Demand Instruments.—Instruments payable on demand are due immediately upon issue; thus they are payable at a time certain. The N. I. L. specifically provides that demand instruments are payable at a time certain.

The N. I. L. also provides that instruments containing no time of payment are deemed to be payable on demand.

(3) Instruments Payable on the Happening of Some Event.—If the event, the happening of which is to mature the paper, is one certain to happen, even though the time of happening of the event be uncertain. Thus, a note payable upon the death of some person is payable at a time certain, because in the experience of man death is a certain event. But an instrument payable when property is sold, or when X marries, is not negotiable; for the event may never happen.

(4) Acceleration Clause—In Option of Maker.—Where a note is made payable at a fixed date, but subject to an acceleration clause in the option of the maker, it is held by the courts that the time is sufficiently certain. So, "On or before January 1, 1929, I promise to pay," etc., would be certain as to time, even though the holder could not tell just when the note would be paid. And a note due June 1, 1929, containing a provision that, "in case of default in interest payment said note to be due at once," would leave the time of payment certain, since the acceleration clause is in the maker's option. If he defaults on an interest payment, he thus causes the note to come due.

ACCELERATION CLAUSE—IN OPTION OF HOLDER.—Where the holder can accelerate the due date of the note, there is a conflict of authority as to certainty of time, with probably the weight of authority against the negotiability of the instrument. Clauses providing that the maker must furnish additional security to the satisfaction of the holder, in default of which the note to become due prior to its fixed date of maturity, constitute acceleration clauses in the holder's option, and destroy certainty as to time of payment.

AUTOMATIC ACCELERATION CLAUSES.—If the acceleration clause is outside the control either of the maker or the holder, the time of payment clearly is uncertain, and the instrument nonnegotiable. Thus, such a clause in a note as, "It is agreed that if, at any time before the date of maturity of this note, the stock deposited as security shall depreciate three points or more, said note shall at once become due and payable," will destroy the negotiability of the instrument.

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6. The Instrument Must Be Payable in Money

By the Negotiable Instruments Act, section 1 (2), a bill or note, to be negotiable, must be payable in money. The word "money," as used in the act, should include legal tender and all media of exchange circulating at par with legal tender. Promises in writing to deliver goods or services, or to pay a sum named in gold bullion, or in foreign coin, are nonnegotiable, because not payable in money. But a note payable in money or goods at the option of the holder is negotiable, for it is payable in money if he elects to demand it.

A bill or note calling absolutely for something in addition to money is nonnegotiable. To be negotiable, it must be payable in money only. A promise to pay a sum of money and to deliver a portion of a crop by way of rent is nonnegotiable.

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7. Words of Negotiability

The instrument, to be negotiable, must contain apt words to make it so. "Order" or "bearer" are commonly used, but any words of similar import will be sufficient. So a certificate of deposit that read, "Received from J. Brown for deposit $3,000, payable on return of this certificate properly indorsed," was held negotiable, on the ground that the words "properly indorsed" had the same effect as "to order," since that was the necessary implication.

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8. Provisions Not Affecting Negotiability

The validity and negotiable character of an instrument are not affected by the fact that—

(1) It is not dated; or

(2) Does not specify the place where it is drawn or is payable; or

(3) Bears a seal; or

(4) Authorizes a confession of judgment; or
(5) Waives the benefit of any law intended for the benefit of the debtor.

Summary

The negotiability of an instrument is to be determined entirely from its face. By its form it is negotiable or nonnegotiable; outside circumstances have absolutely no effect upon the question. Where, therefore, there is an unconditional promise or order in writing, signed by the maker or drawer, to pay at a time certain a sum certain in money, and containing words of negotiability, such an instrument will be negotiable in form.

SECTION 2.—TRANSFER—WHO IS A HOLDER?

1. Negotiation in General

Importance of Being a Holder.—In order that the purchaser of a bill or note take the same free from the defenses of the maker or drawer, it is necessary, not only that the instrument be negotiable in form, but also that he be a holder thereof. To be a holder in due course, one must first be a holder. The question then is: What kind of transfer is essential to constitute the transferee a holder? The answer is: Negotiation.

What Constitutes Negotiation?—Bearer paper is negotiated by delivery alone; for the holder of bearer paper is the person in possession. Order paper is negotiated by indorsement, completed by delivery. The holder of order paper is the payee or indorsee in possession. There are, then, two operative facts necessary to consider in determining whether one is the holder of order paper. These are indorsement and delivery.

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2. Indorsement

What is an Indorsement?—The signature of the indorser, without additional words, is a sufficient indorsement. The indorsement is commonly written on the back of the instrument, but the place is immaterial, so long as there was an intention to indorse it. The indorsement must be written on the instrument, or upon a paper attached thereto. Such attached paper is termed an "allonge." Its use is restricted to instances where the back of the instrument is completely filled with indorsements. Where the indorser writes his name on paper other than the instrument itself, the back of the instrument not being filled, the transfer

is an assignment, not an indorsement, and the assignee gets only the rights of his assignor.

"Assignment" as Indorsement.—Where a holder writes on the back of the instrument, "I hereby assign the within note to B. [Signed] A," this will be an indorsement, in spite of the word "assign," and B will be a holder. The use of the word "assign" or "guarantee," when accompanied by the signature of the holder, does not prevent the transfer from operating as a negotiation of the instrument. It is an indorsement, not an assignment. The only sure way to create an assignment upon the instrument itself is to use words expressly denying that the transfer is by indorsement.

Special Indorsement.—A special indorsement specifies the indorsee to whom the instrument is payable, and the indorsement of that indorsee is necessary to the further negotiation of the instrument. For example, "Pay A. [Signed] P," is a special indorsement, which, with delivery, vests title to the instrument in A.

Designation of the payee or indorsee by the wrong name is immaterial. He may indorse the name as described on the instrument, adding, if he wishes, his own name.

Blank Indorsement.—The blank indorsement consists simply of the signature of the holder, placed usually upon the back of the instrument. Its most important effect is to change order paper to bearer paper. The instrument may thereafter be negotiated by delivery alone. Any one in possession of an instrument, where the last indorsement is in blank, is a holder, since the holder of bearer paper is the person in possession.

Effect of Special Indorsement Following a Blank Indorsement.—A special indorsement, following the blank indorsement, operates to change the instrument back to order paper, and for further negotiation the indorsement of the special indorsee is necessary. This principle applies, however, only to instruments payable to order upon their face. If the instrument is bearer paper upon its face, the rule is, once bearer paper, always bearer paper, and a subsequent special indorsement still leaves the instrument capable of negotiation by delivery alone.

Qualified Indorsement.—The qualified indorsement is made by adding the words "without recourse" to the signature. It is commonly called an "indorsement without recourse."

The effect of the qualified indorsement is to transfer title to the instrument by negotiation, so as to constitute the transferee a holder, and at the same time to prevent the indorser from becoming liable on the instrument.

Restrictive Indorsements.—An indorsement is restrictive which either—

(1) Prohibits the further negotiation of the instruments; or

(2) Constitutes the indorsee the agent of the indorser; or

(3) Conveys title to the indorsee in trust for some other person.

As to the first type, its definition is self-explanatory. The words, "Pay A only," make it impossible for A to negotiate the instrument to any other party, for the drawee or maker is instructed to pay to no one other than A.

As to the second type of restrictive indorsement, that which constitutes the indorsee merely an agent of the indorser, such indorsee has the power to collect and to sue upon the instrument in his own name, but he does so for the benefit of the restrictive indorser. The words, "Pay A for collection," "for my account," "for deposit," etc., are necessary to create a restrictive indorsement of this type.

The third type needs no elaboration. Title to the instrument is conveyed to the indorsee, and he may collect and sue upon the instrument; but he will hold the proceeds in trust for the beneficiary named in the indorsement. An example is, "Pay A for the use of B."

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3. Transfer of Order Paper Without Indorsement

The holder of order paper may transfer his title in the instrument by delivery thereof, without any indorsement. Such a transfer operates as an assignment, and the transferee gets the same title his transferor had. Such a transferee cannot be a holder in due course, for he is not an indorsee in possession, and so is not a holder. However, he will have the rights of a holder in due course, where his transferor was such, under the rule that the transferee gets the rights of the transferor.

Such transferee must prove his right to recover on the instrument; that is, he must prove delivery. In the case of a transferee of order paper, no presumption of delivery is raised by the fact of possession.

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4. Delivery

As to Completed Instruments.—As to a transferee or a holder not in due course, delivery is a condition precedent to the validity of the contract on the note. N. I. L. § 16, provides: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." Delivery is transfer of possession of the instrument with intent to convey title.

A holder in due course, however, of a completed instrument, takes the instrument free from the defense of non-delivery or conditional delivery, since section 16 further provides that "* * * as to holders in due course, a valid delivery by all parties prior * * * is conclusively presumed."

A completed instrument is one filled out in every particular by the maker, or by his agent so authorized, before transfer.

As to Incomplete Instruments.—Where, however, the instrument was incomplete at the time it left the hands of the maker, or the maker's agent, then even as to a holder in due course delivery is an essential requisite to any liability on the instrument. N. I. L. § 15, codifies this rule: "Where an incomplete instrument has not been delivered it will not * * * be a valid contract in the hands of any holder."

Example.

Smith signed his name to a blank negotiable check and locked the check in his safe. The safe was broken into, the check stolen and filled in for $1,000, and negotiated to Brown, a holder in good faith and for value. Smith stopped payment on the check, and Brown sued Smith. Smith would have the defense of nondelivery of an incomplete instrument, which is available even against the holder in due course, Brown.

SECTION 3.—HOLDER FOR VALUE

In General.—Of the five requisites to being a holder in due course and taking the instrument free from personal defenses of the maker, we have determined in sections 1 and 2 the first two, namely, form of negotiability and the manner of transfer necessary to constitute the transferee a holder. Three further requisites remain: What is value, before maturity, and good faith?

What Is Value?—A debt barred by a bankruptcy decree or the statute of limitations, or any consideration sufficient to support a simple contract, will be sufficient to constitute value. Also a donee of an instrument will be a holder for value, if value has at any time been given for the instrument. Suppose that P loaned M $100 and took M's negotiable note for that amount. If, then, P negotiates the note to A as a gift, A will nevertheless be a holder for value, though he himself parted with nothing in exchange for the note.

Money is, of course, value, and the amount of money given for the instrument is immaterial as affecting the question. If A give one dollar for a thousand dollar note, he will be a holder for value to the full amount of the note. The disproportion does not affect A's status as a holder for value, although it will be some evidence that he may be a holder in bad faith.

Crediting Bank Account not Giving Value.—Where a bank purchases an instrument, and simply credits the accounts of the seller, the

bank is not a holder for value (and so not a holder in due course) of the instrument until it has actually paid out a substantial part of this credit. In determining whether the particular money credited has in fact been paid out, the rule is, first money in, first money out.

Example.

Brown induced Smith to buy his farm by fraudulent misrepresentation. As part of the purchase price, Smith delivered to Brown his negotiable note for $5,000. Before maturity, Brown negotiated (indorsed and delivered) the note to the X Bank, and the bank credited Brown's account with $5,000. The bank is not a holder for value, and therefore not a holder in due course; consequently, in a suit on the note, Smith can set up the defense of fraud against the bank.

If at the time of the crediting of the $5,000 for the note, Brown had $1,000 in his account, and Brown drew a check for $900, which was paid by the X Bank, this payment is presumed to be from the original $1,000 balance, and does not constitute a payment from the $5,000 credit.

SECTION 4.—HOLDER BEFORE MATURITY

To be Holder in Due Course, Must be Purchaser Before Maturity.—The fourth requisite to being a holder in due course is that the purchaser must have taken the instrument before it is due. The reason underlying this requirement is much the same as that which underlies the rule that the holder in due course must be one who takes in good faith. That an instrument is offered for sale after its maturity date, when presumptively the primary obligor should have paid it, raises an inference that the reason the instrument is unpaid and still in circulation is that the person primarily liable upon it has a good defense to such payment. Thus a purchaser after maturity is a person charged with notice of possible defenses, and therefore a bad faith taker. Indeed, the rule that a holder, in order to be a holder in due course, must have bought the instrument before maturity, was once part of the broader rule that he must take in good faith. It has become a rigid requirement separate and apart in itself, and now has little to do with the subject of good faith. To purchase an instrument a single day after maturity is to fail of being a holder in due course.

Where Instrument Bears a Fixed Date of Maturity.—Where the bill or note is payable at a fixed date, no doubt or difficulty can exist as to what is maturity. The instrument is due on the date it bears; and

any purchaser after that date is a purchaser after maturity, and subject to all defenses the maker or drawer may have.

Maturity of Demand Instruments.—Where an instrument payable on demand is negotiated an unreasonable time after issue, the holder is not deemed a holder in due course. N. I. L. § 53. In determining what is a "reasonable time," or an "unreasonable time," regard is to be had (1) to the nature of the instrument; (2) the usage of trade or business with respect to such instruments; and (3) the facts of the particular case. N. I. L. § 193.

Demand instruments are intended to circulate for some period of time called "reasonable"; but no test exists, either under the law merchant or under the Negotiable Instruments Law, to determine what is a reasonable time. The nature of the instrument is probably the most important factor. Checks, demand bills, and demand notes have each a differing period. Checks are the shortest lived. It is safe to say that, except under unusual circumstances, a check purchased ten days after issue would in all probability be purchased after maturity. Demand notes and bills of exchange have a longer life, but it is not possible to state any maximum of duration. Six months to a year might not be too long to discredit a demand note bearing interest.

SECTION 5.—HOLDER IN GOOD FAITH

In General.—Where the maker of a note or the drawer of a bill has a defense to the instrument, such as fraud, or failure of consideration, or breach of warranty, it then becomes of importance to the holder, suing to establish his position as that of a holder in due course, in order that he may shut out such defenses. It should be understood that, where there are no defenses, it is immaterial whether the instrument is or is not negotiable in form, or whether or not the plaintiff is a holder in due course; for he may recover upon it then in any event. Therefore the portion of the law of negotiable instruments which we have examined thus far has application only to cases in which the party primarily liable on the bill or note has a complete defense.

What is Good Faith?—The final requisite of a holder in due course is that he be a purchaser in good faith without notice of defenses and defects in title of the person negotiating the instrument. To constitute notice of such defense or defect in title, the purchaser must have had actual knowledge, or at least knowledge of such facts that his action in taking the instrument amounted to bad faith. Knowledge of facts, such

as would put a reasonable person into the belief that the maker of the note has a defense, will amount to bad faith.

Example.

Smith agreed to pay Dr. Brown $250 for a cancer cure, and delivered his negotiable note for that amount in payment. Dr. Brown negotiated the note to Green for $200, but failed to give the treatment. Green sued Smith on the note, claiming to be a holder in due course, and therefore taking free from Smith's defense of no consideration. The evidence showed that this doctor had made a practice of similar transactions in the past, and that he always sold the notes to this plaintiff, Green.

It was held that Green was not a holder in due course, because he was a bad faith taker. Green had knowledge of suspicious circumstances sufficient to put a reasonable person into the belief that a defense existed to the payment of this note, and therefore took subject to that defense. Walters v. Rock, 18 N. D. 45, 115 N. W. 511.

Alterations Apparent on the Instrument.—Where, from erasures or alterations appearing on the face of the instrument, it is plain that a note or bill has been changed, a purchaser thereof takes with notice of possible defenses, and will not be a holder in due course.

Incomplete Instruments.—Wherever the purchaser of a bill or note has knowledge that it was not completely filled up before it left the maker's hands, he takes with notice of a possible defense; for such an instrument must be filled in, in strict accordance with the authorization given.

Negotiable Paper of a Corporation.—One who accepts from an official of a corporation the check or note of the corporation in payment of a personal debt owed by the official has knowledge of such suspicious facts as will constitute notice of a possible defense to the instrument, and will not be a good faith taker.

SECTION 6.—HOLDER FROM A HOLDER IN DUE COURSE

The General Rule.—A holder from a holder in due course is a holder in due course, even though he took the instrument as a gift, after maturity, and with knowledge of defenses. Once a negotiable instrument gets into the hands of a holder in due course, all subsequent holders are holders in due course, deriving their title as such through that of the first holder, quite irrespective of their actual status. One of the reasons for this rule is that a person may convey whatever rights he

has. Another is that this principle increases the negotiability of paper, in that it gives the holder in due course the whole world for his market.

The Exceptions to the Rule.—There are two exceptions to the rule that a holder from a holder in due course is a holder in due course: First, one who was an actual party to the original fraud on the instrument cannot, by acquiring from a holder in due course, recover thereon free from the defense. This does not include the person who merely has knowledge of the defense, but means one who actually participated therein. Secondly, a holder not in due course of an instrument cannot better his position, selling the paper, and then later reacquiring it from a holder in due course. The rule is that the reacquirer is remitted to his former rights on the instrument.

Transferee from a Holder in Due Course.—Where the holder in due course of a negotiable instrument, instead of negotiating by indorsement, conveys title by a simple transfer of possession, the transferee gets the rights of a holder in due course, and can recover on the instrument, free from the maker's defenses. The transferee gets the rights of his transferor, and, since the transferor in such case is a holder in due course, his transferee succeeds to his rights. Since the transferee is not a holder, he cannot be a holder in due course; but the result is much the same, save that he must prove delivery, to show his title and right to sue on the instrument.

CHAPTER 3

RIGHTS OF THE HOLDER AGAINST THE MAKER AND ACCEPTOR

SECTION 1.—THE REAL DEFENSES

In General.—We started the study of the law of negotiable instruments by a statement of the fundamental rule that the holder in due course takes the instrument free from personal defenses of the maker. To be able to apply this rule depends upon an understanding of the undefined terms contained therein. The question, who is a holder in due course? was answered in chapter 2. It remains to discover the meaning of "personal" defenses.

Personal Defenses.—A personal defense is any defense which is not a real defense. Failure of consideration, breach of warranty, fraud in the inducement, nondelivery of a completed instrument, are among the most common. As we have seen, where the maker has a defense of this kind, he cannot avail himself of it in a suit by a holder in due course.

Real Defenses.—The real defenses are available against any holder, including holders in due course, except in cases where the maker is estopped from pleading the defense, by reason of his negligence. We shall consider the real defenses in turn, taking up at the same time the question of estoppel by negligence.

1. Forgery

Forgery is a real defense, available against any holder. It is obvious that a person whose name has been forged is not a party to the instrument and cannot be sued on it. It is not his contract. It is a great deal more just and equitable to throw the loss on the holder in due course, because he can recover from the person who sold him the instrument.

Defense of Forgery Estopped by Negligence of Maker.—Where the forgery of the maker's name was made possible by his own negligence, he will be estopped to plead the defense of forgery in a suit by a holder in due course. Thus, where a person uses a rubber stamp to sign his checks, and his clerk steals the stamp and by its use forges checks, which

are duly cashed by the drawee bank, he cannot object to the charging of his account with these checks, for forgery will be estopped by reason of the maker's negligence in leaving the rubber stamp in his desk unlocked. Negligence is the failure to use the required degree of care. Had the owner of the stamp kept it locked in his safe, the bank could not have charged his account with the forged checks, for in that case there would be no negligence to constitute an estoppel.

The duty of care owed by a depositor to his bank requires him to call for and examine each month his canceled checks. Where during one month a forged check is paid by the drawee bank, and no objection is made by the depositor, and then during following months other forgeries by the same hand are honored, the negligence of the depositor estops his defense of forgery as to these later checks, for, by failing to object, he has allowed the drawee bank to believe that the forged signature is genuine. His account cannot be charged with the first forgery, for here there is no estoppel; but as to the forged checks paid in the following months the depositor is estopped to deny the signature.

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2. Fraud in the Execution

Where a party is induced to sign a negotiable instrument by fraudulent misrepresentations concerning the property offered in exchange for the instrument, the fraud is in the inducement, and is only a personal defense, not available against a holder in due course. In such a case the signer actually knows that he is putting his signature to a negotiable instrument, and that it may fall into the hands of an innocent purchaser. Where, however, the fraud is of such nature that the maker does not, and could not by the exercise of reasonable care, know that the paper he is signing is a negotiable instrument, this is fraud in the execution, a real defense available against any holder.

Negligence as Estoppel.—Wherever by the exercise of ordinary care the maker could have known what he was signing, his failure to read the paper constitutes negligence, which will estop him from setting up the defense of fraud in the execution, in any suit by a holder in due course. So, where M signs a negotiable note to the order of P, believing it to be a receipt, according to P's statement, M would be estopped, by his negligence in failing to read what he was signing, from setting up his defense of fraud in the execution, in a suit on the note brought by a bona fide holder from P.

Example.

Miller agreed to buy from Potter, a nursery salesman, a shipment of small trees and shrubs, the goods to be paid for within ten days after

receipt thereof. Miller signed a paper prepared by Potter, which appeared to be a memorandum of the contract. Miller read the paper before he signed it, and he understood it to be nothing more than what Potter said it was, a contract to purchase the shrubs. As a matter of fact, it contained in the body of the writing a negotiable promissory note. Potter cut from the paper this signed note, and discounted it at the local bank.

Miller would have to pay the note at maturity to the bank. Since he did not know he was signing a note, there was fraud in the execution; but, since he failed to exercise reasonable care to learn the nature of the paper he was signing, this negligence creates an estoppel to plead the real defense. It is not enough to read the paper before signing; the signer must also know its legal effect.

Most instances of fraud in the execution are accompanied by circumstances creating an estoppel to plead the defense. It is only where the signer is blind, or illiterate, and cannot read, and there is no one available to read the paper to him, that the element of negligence is not present, and the maker will not be estopped to plead the defense of fraud in the execution. Being made to sign a note while under the influence of drugs or liquor to such an extent that the signer did not know what he was doing would probably constitute fraud in the execution, under circumstances where there was no negligence to estop the defense.

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3. Nondelivery of an Incomplete Instrument

N. I. L. § 15: Where an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder.

Example.

Miller signed his name to a blank check and locked the check in his safe. A burglar broke into the safe, stole the check and filled it in for $1,000, and negotiated it to Allen, a holder in due course. Miller stopped payment on the check, and Allen sued Miller on the instrument.

In this case Miller's defense of nondelivery of an incomplete instrument will succeed against the holder in due course. There is here no negligence on the part of the drawer to estop his real defense, for Miller used care in putting the blank check into a place of reasonable security.

Defense of Nondelivery Estopped by Negligence.—Lack of ordinary care in the safe-keeping of a blank instrument will constitute negligence, to estop the real defense of nondelivery. In the foregoing example, had Miller allowed the blank check to lie on his desk, instead of locking it up, such negligence in care of the instrument would prevent his plea of nondelivery, and Allen could recover.

Negligence as to an Ordinary Holder in Due Course.—The maker of a blank instrument owes to all possible innocent purchasers thereof a duty to exercise that degree of care in the safe-keeping of the instrument which a reasonably prudent person would exercise. Locking the instrument in a place of security constitutes such care.

Negligence as to Drawee Bank.—As between the depositor and his drawee bank, the former owes to the latter the highest degree of care possible. The mere signing of a check in blank, no matter how much care the drawer takes in its safe-keeping, will, if the instrument is stolen and paid by the drawee bank, constitute negligence to estop the defense of nondelivery.

The reason for this distinction is that the ordinary holder in due course has the option to purchase the instrument or not as he chooses, and relies largely upon the responsibility of the last holder. The drawee bank, on the other hand, is under a contractual duty to the drawer to pay all checks having his signature. Therefore the drawer owes his bank the duty of putting his name on a check only for the purpose of directing the bank to pay the money, and if he signs a check in blank the risk is his.

Example.

Miller locked a blank check bearing his signature in his safe. It was stolen, filled out, and negotiated through several holders, and finally paid by the drawee bank.

Miller cannot object to the charging of his account with the amount the check was filled out for. His defense of nondelivery is estopped by his negligence in signing the check in blank.

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4. Material Alteration

What Constitutes.—Any alteration which changes the date, the sum payable, the interest rate, the time of payment, the number or relation of the parties, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

Effect of Material Alteration.—Where an instrument has been materially altered, it is avoided as between the parties. Thus the holder, who has materially altered the instrument, cannot recover thereon. But the holder in due course of a materially altered instrument, not a party to the alteration, may enforce payment then according to its original tenor. N. I. L. § 124.

Material alteration, therefore, is a real defense, available even against holders in due course, as to all changes effected upon the instrument. Thus, where a $100 note is raised in amount to $1,000, the maker may plead the defense against any holder, and cannot be held liable for more than the original amount, $100.

Estoppel—Leaving Unfilled Spaces.—Where the drawer negligently leaves unfilled spaces upon the instrument, so that the amount payable is raised, and the raised amount is paid by the drawee bank, the account of the drawer may be charged for the full amount. The drawer's negligence estops his defense of material alteration. It is said that in the contract of deposit there is an implied term that the drawer will use care in the drawing of his checks. Loss resulting from breach of this duty is properly chargeable to the drawer. As to checks written in pencil, raised by erasure, and cashed by the drawee bank, the result would be the same.

By the majority rule, leaving blank spaces is not such negligence on the part of the drawer as will estop the defense of material alteration as to a voluntary purchaser of the instrument, even where he is a holder in due course. As to holders in due course, not a drawee bank, there is no doctrine of estoppel to plead the defense of material alteration.

Example.

Miller drew a check for $10, payable to L. Parks or order, carelessly leaving blank spaces before the words and figures. Parks inserted the figure 5 in front of the figure 10, and the words "five hundred" in front of the written amount, thus raising the amount of the check from ten to five hundred and ten dollars. Parks sold the check to Allen, an innocent purchaser for value. The check was dishonored by the drawee bank for insufficient funds, and Allen sued the drawer, Miller, for the face of the check.

Allen, the holder in due course, could recover from Miller only ten dollars, the original tenor of the check.

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5. Incapacity

Incapacity is a real defense available against any holder. An infant's contract is always voidable at the option of the infant. The fact that the contract is evidenced by a negotiable instrument in the hands of a bona fide holder creates no exception to the rule. The infant maker, acceptor, or indorser may always plead his infancy as a complete defense to any liability on the instrument.

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6. Illegality

Wherever by statutory declaration a particular kind of contract is absolutely void, it cannot be enforced, even in the hands of a holder in due course. Illegality is therefore a real defense, available against the holder in due course of a negotiable instrument. Usurious transactions

and gambling contracts are in many states the subject of statutory prohibition declaring the contract void. Such contracts, when incorporated into a negotiable instrument, are unenforceable, even by a holder in due course. In such cases there is no estoppel to deny the defense.

SECTION 2.—ACCEPTANCE

Definition.—The acceptance of a bill of exchange is an unqualified promise by the drawee to pay the amount called for by the bill. Until the bill is accepted, the drawee is under no liability to the holder. After acceptance, the liability of the drawee of a bill to the holder is exactly like the liability of the maker of a promissory note to the holder thereof. In both cases there is a direct promise to pay made to the holder.

There are three different ways in which the drawee of a bill of exchange may incur liability as an acceptor:

1. Express Acceptance On The Face Of The Instrument

Where the acceptance is upon the face of the instrument, the requisites are:

(1) It must be in writing and signed by the drawee; and

(2) It must be an unconditional promise to pay the amount for which the bill is made payable.

The usual acceptance on the face of the instrument consists of the word "Accepted," accompanied by the signature of the drawee.

Where the form of bill of exchange called a check is concerned, its acceptance is called a certification.

2. Express Acceptance Off the Face of the Instrument

It is possible for an acceptance to be written on paper other than the bill itself. A letter or telegram, for example, under certain conditions will constitute acceptance. The requisites of an acceptance off the face of the instrument are:

(1) It must be in writing and signed by the drawee;

(2) It must be a clear and unconditional promise to pay; and

(3) The bill must be purchased in faith on the acceptance.

Example.

Miller, in New York, drew a draft to his own order on Colvin Bros. in Chicago for $5,000 for meats. Miller indorsed the draft to a New York bank, which bank purchased the paper and then wired Colvin Bros., asking if they would accept the draft. Colvin Bros. wired: "Draft is good." The bank sent the draft on for payment and payment was refused. The bank sued Colvin Bros., claiming the telegram was an acceptance.

In this case Colvin Bros. are not liable, for two of the requisites of an acceptance off the face of the instrument are not present. The New York bank did not buy the draft in faith on the acceptance, for they bought it before the telegram of Colvin Bros. was received. Also, even though they had, there is not liability for the reason that the words of Colvin Bros.' wire did not constitute a clear promise to pay.

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3. Implied Acceptance

N. I. L. § 137.—Where the drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours to return the bill, accepted or nonaccepted, to the holder, he will be deemed to have accepted the same.

It will be noted that the act uses the word "refuse." Thus the mere retention of the bill by the drawee for more than twenty-four hours will not constitute an acceptance. There must be a demand and a refusal.

CHAPTER 4

RIGHTS OF THE HOLDER AGAINST PRIOR INDORSERS

SECTION 1.—LIABILITY OF THE UNQUALIFIED INDORSER

1. Conditional Liability on the Instrument

General Rule.—Every indorser who puts his signature without qualification upon an instrument thereby engages that he will pay the amount thereof to the holder, provided (1) that the instrument is duly presented to the primary party for payment; and (2) that he be given due notice of dishonor. The liability of the indorser is a contractual liability on the instrument. By putting his signature on the paper, the blank or special indorser impliedly says: "To Any Subsequent Holder: If the maker does not pay this note upon due presentment, I agree to pay it, provided I am given due notice of the dishonor."

Since the indorser contracts to pay to the holder the amount called for by the instrument, his obligation is even greater than that of the primary party; for the indorser is liable to subsequent holders, no matter what the reason for nonpayment by the party primarily liable on the instrument. The maker of a note may have a real defense, by which he may escape liability, even to a holder in due course in which case the indorser must pay the note.

The liability of the indorser to the holder is, however, conditioned. The holder must, in the first place, make due presentment of the instrument to the party primarily looked to for payment. This primary party, in the case of a note, is the maker. In the case of a bill of exchange or a check, it is the drawee. The second condition to the indorser's liability is that, in case the drawee or maker refuse payment, the holder give the indorser due notice of dishonor. It remains to consider what will constitute due presentment and due notice of dishonor.

(a) Condition of Due Presentment

Presentment of Instrument Bearing Fixed Maturity—N. I. L. § 71.—*Where an instrument is not payable on demand, presentment must be made on the day it falls due.*

Presentment of Demand Note—N. I. L. § 71.—*Where an instrument is payable on demand presentment must be made within a reason-*

able time after issue. In determining what is a reasonable time, the same considerations govern for purposes of due presentment as in the situation previously discussed of the purchase of demand paper after issue, but before maturity, so that the holder may be a holder in due course. In general, it may be said that, where a person buys demand paper within such time after issue that he would be a holder in due course, if he then makes immediate presentment and gives due notice of dishonor, he will be able to hold indorsers. Thus, of a demand note purchased six months after issue and then presented for payment, there would be a due presentment.

Presentment of a Demand Bill—N. I. L. § 71.—*In the case of a demand bill of exchange, presentment for payment will be sufficient, if made within a reasonable time after the last negotiation thereof.* From this it will be seen that the liability of the drawer and indorsers of a bill of exchange, which has been destroyed by failure to make presentment, may be revived by a further negotiation of the bill and a presentment within a reasonable time thereafter. Since a check is a form of bill of exchange, this provision applies also to indorsers of checks.

Example.

Miller drew a check for $100 to the order of Potter, dated January 1, 1925. Potter indorsed to Allen, and Allen to Baker, both by blank indorsements. Baker mislaid the check and did not find it until 1928. By the lapse of time, the liability of Potter and Allen as indorsers to the holder, Baker, has disappeared.

Baker, instead of attempting to sue Potter and Allen, negotiated the check on June 1, 1928, to Carroll, who the same day presented it for payment to the drawee bank, where payment was refused for insufficient funds. Carroll notified Potter, Allen, and Baker of the dishonor. Under these circumstances, all indorsers are liable, inasmuch as there was presentment within a reasonable time after the last negotiation.

Presentment to Charge the Drawer of a Check.—The liability of the drawer of a check is very different from that of the drawer of other forms of a bill of exchange. Like an indorser, the drawer of an ordinary bill will be discharged from all liability on the instrument by a failure to make due presentment. The drawer of a check, on the other hand, will never be discharged, except in the one case where the delay of the holder in making due presentment causes a loss to the drawer, and then the discharge is only to the extent of his loss.

N. I. L. § 186.—*A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from all liability thereon to the extent of the loss caused by the delay.*

What is Reasonable Time on a Check?—Reasonable time of presentment on a check is a very few days after the date of its issue (or after the date of its last negotiation to charge indorsers). Where the parties

live in the same town, twenty-four to forty-eight hours is usual; a longer time might well be deemed unreasonable. The time ordinarily necessary for the check to go through the usual channels for clearance will determine what is reasonable. Checks are very different from demand notes in this regard.

Example.

Miller drew a check, dated January 1, on the State Bank, payable to the order of Potter. Potter indorsed to Abbott, and Abbott to Bissell. Bissell held the check six days, and on January 10 presented it for payment, but discovered that the State Bank had failed that day. The bank finally paid fifty cents on the dollar.

Bissell could not hold the indorsers, Potter and Abbott. Since the presentment was six days after the last negotiation, the time is unreasonable, and the indorsers are discharged.

Bissell may only hold the drawer, Miller, for one-half the face value of the check. Since the presentment was an unreasonable time after issue, the drawer is discharged to the extent of his loss.

(b) Condition of Due Notice of Dishonor

Drawer and Indorsers Must be Notified of Dishonor.—When a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any such party to whom such notice is not given is discharged.

What Constitutes Notice?—The notice may be oral or in writing, so long as it identifies the instrument and indicates that it has been dishonored by nonacceptance or nonpayment. Telephone calls to the drawer and each indorser would be sufficient; but careful practice should limit notice to a written communication.

Time—Where Parties Reside in Same Place.—Where the parties reside in the same town, notice must be given not later than the day following the dishonor.

Time—Where Parties Reside in Different Places.—Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

(1) If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or, if there be no mail at a convenient hour on that day, by the next mail thereafter.

(2) If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision.

By Mail.—Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

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2. Unconditional Liability of Unqualified Indorser on Warranties

In addition to his conditional liability on the instrument, as explained above, the unqualified indorser is under another form of liability to the holder. In his capacity of seller of the instrument, as part of the contract of sale, the unqualified indorser impliedly warrants the truth of certain facts. The unconditional liability of the indorser, which arises, not from his contract of indorsement, but from the fact that he is a seller of property, is defined in the following section:

N. I. L. § 66.—Every indorser, who indorses without qualification, warrants to all subsequent holders in due course:

(1) That the instrument is genuine and in all respects what it purports to be:

(2) That he has good title to it;

(3) That all prior parties had capacity to contract; and

(4) That the instrument is at the time of his indorsement valid and subsisting.

It will be noted from this that the indorser warrants against all real defenses of the maker; that is, if the maker can defeat a recovery by the holder, by pleading forgery, nondelivery, incapacity, illegality, or material alteration, there is a breach of warranty on the part of the indorser, and the holder can sue the indorser for the breach; the amount of his damages being the value of the instrument.

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3. Summary—Rights of Holder Against Unqualified Indorser

(1) Where the maker of the note or the drawee of a bill refuses payment without a defense, the holder may prefer to recover from the indorser. He may do so, provided he made due presentment and gave due notice of dishonor; this by virtue of the contract of indorsement.

(2) Where the holder failed to make due presentment, or failed to give due notice of dishonor, so that the liability of the indorser above referred to is discharged, the holder may yet sue the indorser in any case where, by virtue of a real defense, the primary party on the instrument

is able to avoid liability; for, in any such case of real defense, one of the four warranties of the unqualified indorser will be found to have been broken.

SECTION 2.—LIABILITY OF THE QUALIFIED INDORSER

What is the Qualified Indorsement?—Where to the indorser's signature he adds the words "without recourse," the indorsement is qualified. Such an indorser is not liable upon any contract of indorsement, because he expressly negatives any engagement to pay the instrument if the primary party does not pay, by his use of the words "without recourse." He has no liability whatever upon the instrument.

Warranties of the Qualified Indorser.—The indorser without recourse does not, however, escape all liability to the holder. Like the unqualified indorser, he is the seller or vendor of the instrument. It will be recalled that, purely as such vendor, the unqualified indorser undertakes an unconditional liability to the holder. So, also, and in similar manner, does the indorser without recourse. He, too, warrants to all subsequent holders the truth of certain facts about the instrument. The section of the act which defines the liability of the unqualified indorser is as follows:

N. I. L. § 65.—Every person negotiating an instrument by delivery or by qualified indorsement, warrants—

(1) That the instrument is genuine and in all respects what it purports to be;

(2) That he has good title to it;

(3) That all prior parties had capacity to contract; and

(4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

It is of the utmost importance to note carefully the difference between the warranties of the qualified and unqualified indorser. The first three warranties are identical in wording in both instances. The fourth warranty of the qualified indorser, however, is much more limited in scope than that of the unqualified indorser. The latter warrants absolutely the validity of the obligation, that there is no illegality to render the instrument invalid. The qualified indorser, on the other hand, warrants only that so far as he knows there is nothing to affect the validity of the obligation.

Summary—Rights of Holder Against Qualified Indorser.—(1) Where the maker of the note or the drawee of the bill refuses payment without a real defense, the holder is limited to his rights to judg-

ment against such primary party. The holder has no right of recovery on the instrument against the qualified indorser. There is no engagement on the part of the indorser without recourse to pay in case the primary party fails to pay.

(2) Where the refusal of the primary party to pay is because of the existence of the real defense of forgery, incapacity or material alteration, the holder may sue the qualified indorser for breach of warranty. In the case of an invalid obligation because of illegality, however, the holder, to show a breach of warranty, must prove that the qualified indorser had knowledge of the facts constituting the illegality.

SECTION 3.—LIABILITY OF THE TRANSFEROR BY DELIVERY

Quite clearly the transferor has no liability on the instrument, since his signature does not appear thereon. His warranties are the same as those of the qualified indorser. The liability of the transferor by delivery to the holder is the same as that of the qualified indorser, with one important exception. The warranties of the qualified indorser extend to all subsequent holders; whereas the warranties of the transferor by delivery extend only to his immediate transferee.

SALES

CHAPTER 1

NATURE AND FORM OF THE CONTRACT OF SALE

Contract of Sale Defined.—A sale is the transfer of the ownership in goods for a price in money. Ownership is the sum total of rights in relation to an object held by one person to the exclusion of all others. By goods is meant commodities or merchandise.

Distinction Between Sale and Contract to Sell.—In a present sale there is an actual transfer of the title or ownership in the goods to the buyer. In a contract to sell, however, there is merely an enforceable agreement that at some future time the title or ownership shall be vested in the buyer. The importance of the distinction is obvious. If the contract is of a present sale, and the title has passed to the buyer, any subsequent loss or damage to the goods must fall upon him, because he is the owner of them. If, however, the contract is one of future sale, the seller being still the owner of the goods any loss or injury to them must fall upon him.

Sales a Branch of the Law of Contracts.—A sale of goods is a contract, and the fundamental principles of the law of contracts governs the transaction. All the requisites to a binding contract are essential to constitute a sale, offer and acceptance, consideration, capacity, legality, reality of consent, etc. Since we have previously studied these matters, a repetition will be unnecessary.

The law of sales, as a branch of the law of contracts, deals particularly with the question as to when title passes and the special remedies for breach of warranty of the goods sold. The Uniform Sales Act is a codification of the law on the subject. Approved by the Commission on Uniform State Laws, in 1926, it has since been adopted as part of the statute law of most of the states. The matter that follows has been written with reference to this act.

What Title Passes by a Sale.—The general rule is that a person can convey no better title than he has. A thief or finder gets no title to goods which thus come into his possession, and therefore he can convey none; and, no matter how long the list of innocent purchasers through whose hands the goods pass, the owner, from whom the articles

were stolen or who lost them, may nevertheless recover possession, provided he can prove their identity. The law places the burden upon the buyer to make sure that the person about to sell him goods has good title to them.

The chief exception to this rule applies to money and negotiable instruments, as already explained. Another exception applies to negotiable bills of lading and warehouse receipts. These documents are symbols of title to the goods which they represent, and like a negotiable note or bill of exchange may be negotiated by a thief or finder, so as to give a good title to an innocent purchaser.

Form of Contract of Sale.—Except for those sales within the operation of the Statute of Frauds, the agreement may be oral, or it may be implied from the conduct or acts of the parties. The vast majority of sale transactions are not evidenced by a writing. However, of all contracts for the sale of goods above the value of five hundred dollars the law requires either:

(1) Earnest or part payment; or
(2) Acceptance and receipt by the buyer; or
(3) A written memorandum of the contract.

Since we have already discussed this matter in the chapter relating to the formal requisites to a binding contract, a redevelopment of the question is unnecessary here.

When Title Passes.—Probably the most important problem with which the law of sales deals is the determination of the time when title to the property passes from the seller to the buyer. In the determination of this question all contracts of sale are first classified according to whether they fall into one or the other of two categories, and next the rules applicable to the particular category are applied, from which the solution is reached. These two categories are: (1) Contracts to sell ascertained goods; and (2) contracts to sell unascertained goods. In the two chapters following we shall consider the rules governing each category, and their application.

What are Ascertained and Unascertained Goods?—All goods are either ascertained or unascertained. Goods are ascertained, where the parties know the certain, specific article to be sold. An example would be where the seller, pointing to the object which is before them, offers to sell it to the buyer. Or where A says to B: "I will sell you my automobile." If A has two automobiles, so far at least the goods are unascertained; but if, in such case, A had gone on and in some manner identified which of the two was to be sold, the contract would have been of ascertained goods. The test is whether or not the subject-matter of the sale is by the agreement of the parties clearly identified.

CHAPTER 2

TRANSFER OF TITLE IN SALES OF ASCERTAINED GOODS

SECTION 1.—GENERAL RULE—TITLE PASSES ACCORDING TO INTENTION

Uniform Sales Act, § 18.—*Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties intend it to be transferred.*

The above section states the general rule as to whether a contract of sale of ascertained goods is executed or executory; that is, whether or not title has passed. As to ascertained goods, then, it is within the power of the parties to pass an immediate title merely by expressing their intention so to do.

Determination of Actual Intention.—In many cases the parties fail to express their intention on this subject. It is then for the court to determine their intention from an examination of the terms of the contract, the usage of the trade or business, and the circumstances of the particular case.

Where No Actual Intention, Presumptions.—In a large number of instances it is probable that the parties neglect to consider the detail of the precise moment title is to pass, and so they have no actual intention as to this question. Wherever, then, the court is unable to determine from the evidence the intention of the parties, it applies certain fixed legal presumptions as to intention. These rules of presumption, as stated in section 19 of the Sales Act, are five in number, each of which we shall consider separately.

SECTION 2.—PRESUMPTIONS AS TO WHEN TITLE PASSES WHERE INTENTION NOT EXPRESSED

Rule 1.—Title to Specific Goods in a Deliverable State Passes When Contract is Made

Uniform Sales Act, § 19, Rule 1.—*(Unless a different intention appears:) Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made; and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.*

ABRAHAM v. KARGER.

Supreme Court of Wisconsin, 1898. 100 Wis. 387, 76 N. W. 330.

PINNEY, J. This was an action for the recovery of a lot of merchandise stored by the defendant, Karger, at No. 559 East Water street, Milwaukee, and in charge of one Bing, a relative of Karger, to sell for him on commission. The plaintiff, Clara Abraham, was at this time conducting a business under the name of the "Milwaukee Knitting Works." This business was managed for her by her father, Louis Abraham, as her agent, who a few days prior to August 26, 1896, began negotiations with Bing for the purchase of the merchandise belonging to the defendant, Karger. These negotiations were in part conducted, according to the evidence of the plaintiff, Abraham, in the presence of, and with the sanction of, the defendant, Karger. There was a dispute between the witnesses for the plaintiff, on the one side, and the defendant and his witnesses, on the other, as to the terms of sale finally agreed on between the plaintiff and defendant. On the part of the plaintiff, Louis Abraham testified that the agreement as finally made was that the plaintiff was to pay the defendant, Karger, for this stock $2,000 in cash, and to deliver to him the note of one W. A. Meyer for $500; and this was corroborated by the evidence of James L. Gates, a witness on the part of the plaintiff, who testified that the defendant, Karger, stated to him that such was the case. The testimony of Karger and his witnesses was that the plaintiff was to pay to the defendant $2,500 in cash, and that Karger did not agree or consent in any way to accept the note of Meyer in payment of part of the consideration; and it appeared that this dispute as to the terms of the sale was the only matter upon which there was any conflict of testimony. On all other points the witnesses substantially agreed.

At the time when the bargain was made, Louis Abraham paid Bing $25 to bind the bargain. The next day, the plaintiff, Abraham, paid to Bing $1,500, and at the time Bing gave to Abraham an invoice or statement, drawn up in Bing's handwriting, which recites the value of the merchandise at $4,100, the payment by cash and merchandise in exchange of $3,100; the balance of $1,000 to be paid, $500 in cash, and $500 in W. A. Meyer's note. Both Bing and Abraham admit that the purchase price was $2,500, and that no merchandise was given in exchange; that the bill or invoice was made out this way as a matter of convenience between the parties. And Bing further claims that the statement that the balance was to be $500 in cash and $500 in notes did not express the true understanding between them. August 24th, the plaintiff, through Louis Abraham, paid $500 more on the purchase; and, on the 26th of August, Louis Abraham tendered to the defendant, Karger, Meyer's note for $500, payable to the Milwaukee Knitting Works, and indorsed, "C. Abraham, Proprietor." This tender was refused, and Karger said to Abraham, "If you don't have the money before noon, I am going to store the goods, and you will have to pay the

costs;" whereupon the plaintiff, Clara Abraham, brought replevin, charging the unlawful and wrongful detention of the property.

The court, in its charge to the jury, in effect told them that the question at issue was whether the sale was to be for cash and notes, as testified to by the plaintiff's witnesses, or for cash solely, as testified to by the defendant and his witnesses; that, if they found the claim of the plaintiff to be correct, then the verdict should be in favor of the plaintiff; if they found the facts as to the sale or agreement to be as claimed by the defendant, then they should find for the defendant. The jury found for the plaintiff, and that she was the owner of, and entitled to the possession of, the goods seized under the writ; that the same were unlawfully detained from her by the defendant; that the value of the property was $3,500. The plaintiff had judgment against the defendant for the possession of the property, and for the recovery of the costs, together with the damages of 6 cents. * * *

There was evidence on the part of the plaintiff to maintain these contentions. It is established by the verdict as a verity that payment of the $2,000 in money, and tender of the note of Meyer for $500, were made. Such payment and tender of payment prior to the time of the commencement of the action had the same effect as actual payment upon the rights of the parties. There is nothing to show that the contract was executory, so far as anything remaining to be done to the goods was concerned. The evidence shows that they were ready for delivery, and set apart, and the price agreed upon, and a partial delivery made before the tender of the $500 note. The goods were in the sight of the parties, and were pointed out in the presence of Karger, the defendant, when it was agreed that he was to get $2,000 in cash and W. A. Meyer's note for $500 for them. There can be no doubt but that, under the circumstances stated, the title to the goods, and the right of possession as well, passed to the plaintiff, and, if afterwards they were wrongfully detained, she might maintain replevin for them. "When the terms of sale are agreed on, and the bargain is struck, and everything the seller is to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or time of payment. * * * But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivery of the goods, the vendee is immediately entitled to the possession, and the right of property vests at once in him." 2 Kent, Comm. (9th Ed.) 671. * * * The evidence as to what actually did occur, or what was agreed on between the parties, is in some respects conflicting and contradictory. The case was rightly submitted to the jury to find upon the vital point in dispute, and thus determine whether the property and right of possession passed to the plaintiff. The evidence was clearly sufficient to sustain the finding of the jury, and the court could not have properly directed a verdict for the defendant. * * *

A discussion of the evidence contained in the printed case would serve no useful purpose. For these reasons, the judgment of the superior court of Milwaukee county must be affirmed. Judgment is ordered accordingly.

RAIL v. LITTLE FALLS LUMBER CO.

Supreme Court of Minnesota, 1891. 47 Minn. 422, 50 N. W. 471.

[Action on a contract of sale of timber. The evidence shows that, after the agreement of purchase was entered into between the parties, but before delivery to the buyer, the logs which were the subject-matter of the contract were destroyed by fire. Plaintiff, the seller, maintains that the risk of loss was upon the buyer, for the reason that title passed at the time of the contract of sale. The issue was joined on whether or not title had passed. The said contract was as follows: "I, Case Rail, hereby sell to the Little Falls Lumber Company, 247 logs, marked 'C. R.' and stamped 'C. R.' and scaling 61,300 feet, at $7 per thousand feet, to be delivered by me in the Mississippi river, the same being now," etc. "Payments to be made as follows: (Here the installments to be paid were set out.)]"

COLLINS, J. The single question here presented is whether the contract entered into between these parties was an executed one, or simply executory. If the former, the title to the logs * * * vested in the vendee corporation; the risk attendant upon the title and the subsequent loss * * * must be borne by it, unaffected by the fact that the vendor was to make delivery in the Mississippi river.

There is a seeming confusion in the decisions as to when the title to personal property does pass on sale, but it has arisen out of a failure clearly to distinguish between general contracts for the sale of chattels, of a certain kind and contracts for the sale of chattels, specifically ascertained and identified. [In the latter case there can be no doubt but that title passes at the time of the contract.] In the case at bar there should be no doubt upon the undisputed facts, that the title vested in the vendee at the date of the agreement. All of the vendor's logs lying at a certain point, * * * the same being duly marked and scaled, were included in the writing. * * * [The subject-matter of the contract being ascertained by the agreement, and the goods being in a deliverable condition, in every respect it was a completed contract, and the assent of both parties that title should pass was obvious. Since title had passed, the loss was upon the purchasers, and plaintiff's action for the deferred installments must be sustained.]

RULE 2.—WHERE GOODS NOT IN DELIVERABLE STATE, TITLE DOES NOT PASS UNTIL THIS IS DONE

Uniform Sales Act, § 19(2).—*(Unless a different intention appears:) Where there is a contract to sell specific goods and the seller is bound to do something to the the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.*

J. B. BRADFORD PIANO CO. v. HACKER.

Supreme Court of Wisconsin, 1916. 162 Wis. 335, 156 N. W. 140.

[Action by the J. B. Bradford Piano Company against Bertha Hacker. From a judgment for defendant, plaintiff appeals. This is an action to recover the purchase price of a Conover inner player piano sold by the plaintiff to the defendant. * * * At the time the contract was entered into defendant finally showed a preference for one and agreed to take it provided the case would be stained a certain darker color and the tone made more brilliant, which was agreed to. * * * An order was duly sent, confirming the verbal order, dated April 4, 1914. On April 7, 1914, the defendant sent a letter to the Bradford Piano Company repudiating the contract. The Bradford Company on May 2, 1914, made a tender of delivery of the piano as refinished. At the time of the trial the piano was in the warerooms of the Bradford Company. * * * The trial court directed a verdict for the defendant.]

SIEBECKER, J. The trial court held that the facts and circumstances show, as matter of law, that the property in the piano was not transferred to Miss Hacker at the time the written order for the purchase was given nor prior to the time Miss Hacker repudiated this contract on April 7, 1914. The plaintiff assails this holding of the trial court upon the ground that, on the evidence, it was a question for the jury to determine whether or not the parties to the contract intended that the property in the piano was transferred prior to the time defendant repudiated the sale. The evidence shows that defendant and plaintiff's agent negotiated for the sale on April 2, 1914, at the factory of the Cable Company in the city of Chicago, where the defendant selected the piano in question. It appears that she was not satisfied with the color of the case of the instrument she selected, and insisted on having the color altered and made darker. The manufacturer agreed with plaintiff and defendant to alter the color so as to comply with the understanding of the parties, to regulate the tone of the instrument as defendant desired it, and to insert the player action and test it, as is usually done before sending instruments from the factory to customers. The sale price and the shipment of the instrument by railroad to Hartford, Wis., by the plaintiff were agreed upon by plaintiff's agent and defendant, as specified in the written memorandum of sale set out

in the above statement. The defendant signed this memorandum at the depot in Chicago. The evidence shows that the piano was returned to the varnishing department of the factory, and a color coat of varnish applied to bring the color to the shade desired by the defendant. After this coat had dried two more coats of regular vanish were put on, which, when properly dried, completed the piano so that it was ready for shipment. This process took from two to three weeks, when the instrument was boxed and shipped. Defendant repudiated the contract on the fifth day from the date of sale. The facts and circumstances show that the piano was not in a deliverable condition at any time up to the date of the repudiation on April 7, 1914. The contract also required the shipment of the instrument from Chicago to Hartford, Wis., which could not be done, and in fact was not attempted to be done, within two weeks or more after the sale. The conduct of the parties at the factory and in negotiating the sale, when taken in connection with the terms of the contract and the circumstances of the case, fail to show that it was mutually understood and intended that the property in the instrument should pass to defendant at this time. It is plain that the defendant had no control of nor any dominion over the instrument while in the factory, and that the Cable Company retained full control and possession to deal with the property as its own. The evidence, showing the entire transaction, does not permit of the inference that the parties mutually intended that the property passed to defendant under the agreement of sale of the instrument, as contemplated by the provisions of [section 19, rule 2, of the Sales Act]. * * *

It is obvious that the piano was not in a deliverable state until the coloring of the case had been altered to comply with the conditions of the sale within the contemplation of this statute, and hence the property had not passed when defendant repudiated the sale. * * * Under the circumstances and conditions of the sale, defendant's breach of the contract on April 7, 1914, renders her liable to the plaintiff for the damages it suffered from such breach. * * * It was held in Badger State Lumber Co. v. Jones Lumber Co., 140 Wis. 73, 121 N. W. 933, that, where specific performance cannot be enforced, either party may stop performance and subject himself to the payment of compensatory damages. "In such cases it is held that an action cannot be maintained to recover the contract price, but may be maintained to recover damages for the breach of the contract"—citing cases in this court. The complaint is framed for recovery of the purchase price, and no evidence was offered to show damages resulting from the breach of contract. Appellant makes no claim upon the record for recovery of damages. The most liberal rule of practice, * * * in the light of the record, would entitle plaintiff to no more than nominal damages, and requires affirmance of the judgment. * * *

The judgment appealed from is affirmed.

BALLANTYNE v. APPLETON.

Supreme Judicial Court of Maine, 1890. 82 Me. 570, 20 A. 235.

LIBBEY, J. This is trover to recover the value of thirty-six cords of poplar wood, which the defendant took and sold as the assignee in insolvency of the Lincoln Pulp and Paper Company. The issue involved between the parties is whether as between the plaintiff and the company the title to the wood had passed to the company, or remained in the plaintiff.

It was hauled by the plaintiff and piled up on the lands of the company in December, 1886, and in January, 1887, under a written contract between the parties, the material part of which reads as follows:

"R. R. Ballantyne * * * agrees to furnish and deliver on the company's land at mill in Lincoln, one hundred and twenty-five cords peeled, green, poplar wood, to be cut four feet long from point to scarf and generally cleft; to be sound and merchantable; to contain no logs unsplit larger than seven inches in diameter, and no sticks larger than seven by eight inches, no small wood less than three inches in diameter, when peeled. All to be delivered by the first day of May next. Said wood to be well peeled, knotted, cleaned, and fitted for the chipper, and to be well piled, bottom tiers to be protected. Said wood shall be surveyed by some competent surveyor, when so peeled, to be appointed and paid by said company. And it is further agreed that a deduction shall be made in the survey for wood cut short, and for decayed, crooked, and small wood. And the party of the first part agrees to pay therefor at the rate of four dollars per cord when said wood shall be delivered and surveyed as aforesaid." * * *

The plaintiff commenced hauling his wood, in the performance * * * of the contract * * * in December, 1886; and as he hauled it, piled it upon the land of the company at a point designated by the company's agent. When he learned of the insolvency of the company in January, he went to the company's office and informed its agent, whom he found there, that he did not wish to have the wood scaled, and that he claimed it as his. And to that, the agent replied, "All right." The wood hauled was never scaled by any surveyor; nothing was paid for it, and no part of it used by the company.

Upon these facts, we think the title did not pass to the company under the contract between the parties. The general rule of law applicable to cases like this is, "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benj. Sales, vol. 1, book 1, c. 3, § 360; Houdlette v. Tallman, 14 Me. 400. * * *

Sometime the facts of the case may take it out of this rule; but we discover nothing in this case which should do so. * * *

From the language of the contract, we think it must be held that the parties contemplated that these acts should be done and the wood

paid for before the title passed to the purchaser. It was to be surveyed according to the terms of the contract by a competent surveyor. The quantity could be ascertained only by measurement. But a mere survey by measurement would not comply with the terms of the contract. The duty of the surveyor would require him to carefully inspect the wood and determine whether it complied with the terms of the contract in kind, quality, and dimensions, and to determine what deduction should be made if any portion of it was found not to comply with the terms of the contract. Berry v. Reed, 53 Me. 487. And the payment by the purchaser was to be concurrent with the survey and delivery. None of these conditions had been complied with, nor had they been waived by either party. * * *

Judgment for the plaintiff. * * *

AUTOMATIC TIME-TABLE ADVERTISING CO. v. AUTOMATIC TIME-TABLE CO.

Supreme Judicial Court of Massachusetts, 1911. 208 Mass. 252, 94 N. E. 462.

[Action by the Automatic Time-Table Advertising Company against the Automatic Time-Table Company. There was a verdict for plaintiff, and defendant brings exceptions. This was an action of contract for damages for defendant's failure to comply with its terms. The contract recited that defendant sold plaintiff the following goods:] Twelve automatic time-table machines complete, together with all printed matter, time-tables, electro-plates, printed goods and advertising matter, and advertising contracts, relating to said machines, which were sold, assigned and transferred to the said Automatic Time-Table Company by the said Automatic Time-Table Advertising Company under agreement, dated July 13, 1909. Said machines are described and located as follows: One machine located at Merrimack Square, in Lowell, Mass., one machine located in Lawrence, Mass., one machine located in Haverhill, Mass., one machine located in Salem, Mass., one machine located in Lynn, Mass., one machine located in Chelsea, Mass., six machines now standing in the shop of the Automatic Time-Table Company, 58 Middle street, Lowell, Massachusetts, and numbered on door on battery side of case respectively as follows: 8, 9, 10, 11, 12 and 13. * * *

LORING, J. The contract of July 16th was a contract for the sale of 12 specific machines and not a contract for the sale of 12 machines of a particular description. By its terms it purports to be a present sale, but it was a sale of "twelve automatic time-table machines complete," and there was evidence that no one of the "six machines now standing in the shop of the Automatic Time-Table Company" was complete.

The bill of exceptions is somewhat obscure on this point. But as we interpret it there was evidence that apart from the Gordon batteries no one of these six machines was complete. We speak of the parts

of the machine other than the Gordon batteries because it seems to have been the undisputed fact that as matter of practice these batteries were not put into the machines until they were set up for use on the premises of the purchaser or licensee, and setting up these machines on the premises of the plaintiff was not part of the obligation of the vendor under the contract here in question. It appeared that that was to be paid for by the vendee in addition to the purchase price named in the written contract.

The contract does not say that the "twelve automatic time-table machines" were complete, but it says that the defendant sells to the plaintiff "twelve automatic time-table machines complete." Evidence that the six here in question were in fact incomplete was admissible as one of the circumstances under which the contract was made and so one of the circumstances in the light of which it was to be construed.

Since something had to be done to the machines to put them in a deliverable state and a different intention did not appear, the property in the 6 machines here in question did not pass on the execution of the contract. The transaction was governed by the Sales Act (St. 1908, c. 237) and it is there so provided in section 19, rule 2. The rule was the same at common law. * * *

The defendant contends that the cases of Glover v. Austin, 6 Pick. 209, Glover v. Hunnewell, 6 Pick. 222, Sumner v. Hamlet, 12 Pick. 76, Thorndike v. Bath, 114 Mass. 116, 19 Am. Rep. 318, Mauger v. Crosby, 117 Mass. 330, and Whittle v. Phelps, 181 Mass. 317, 63 N. E. 907, are decisions to the contrary. Those are cases where it appeared that it was the intention of the parties to sell the chattel in its unfinished condition with an agreement by the seller to complete it; or in the language of St. 1908, c. 237, § 19, those were cases where a different intention did appear.

The contract of July 16th, therefore, was not a contract of present sale of six unfinished machines with an agreement on the part of the defendant to complete them, but it was a contract to complete the six unfinished machines which on completion were to become the property of the plaintiff. * * * The bill of exceptions went no further than to state that the "fire greatly damaged the 6 machines standing in the defendant's premises." * * *

The learned counsel for the defendant misconceives the character of the action now before us when he contends that the plaintiff has not put himself in a position to sue on the footing that the contract is rescinded. This is not an action founded on the decision of the contract of July 16th, but it is an action on that contract to recover damages for the defendant's failure to complete the 6 machines which at the date of the contract were standing in its shop, and on completion of them to pass the title to the plaintiff. * * *

RULE 3.—CONTRACTS ON SALE AND RETURN, AND CONTRACTS TO SELL ON APPROVAL

Uniform Sales Act, § 19 (3), Rule 3 (1).—*When goods are delivered to the buyer "on sale or return" or on other terms indicating an intention to make a present sale but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or if no time fixed, within a reasonable time.*

Uniform Sales Act, § 19 (3), Rule 3 (2).—*When goods are delivered to the buyer on approval or on trial and satisfaction, or other similar terms, the property therein passes to the buyer: (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction. (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for a return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.*

FOLEY v. FELRATH.

Supreme Court of Alabama, 1893. 98 Ala. 176, 13 So. 485, 39 Am. St. Rep. 39.

[From the evidence it appeared that the plaintiff, Foley, of New York, entered into an agreement with the defendant, a retail dealer in Mobile, Alabama, to sell to the latter a shipment of goods. By the contract of sale it was agreed that the defendant buyer was to have the right to return such of the goods to be shipped to him as he would select, either for credit or exchange. The goods were shipped to the buyer by express, but were lost in transit to Alabama. This was an action for the purchase price, based on the theory that title had passed to the defendant.]

HARALSON, J. * * * "Where * * * goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be divested by the exercise of this option to rescind expressed within a reasonable time." * * * An option to purchase if the party to whom the goods are transferred should like is very different from an option to return the goods if he should not like them. * * * [In the latter case, which is the situation here before us, title passes to the buyer, and the risk of loss will be upon him. Judgment for plaintiff.]

NEAL, CLARK & NEAL CO. v. TARBY.

Supreme Court of New York, Special Term, Erie County, 1917. 99 Misc. Rep. 380, 163 N. Y. S. 675.

[Action by the Neal, Clark & Neal Company against Michael J. Tarby. From a judgment dismissing the complaint, plaintiff appeals.]

WHEELER, J. The facts in this case are undisputed, and briefly stated are: That the plaintiff, among other things, deals in Victrolas. One Fertig was the solicitor of advertising, and in that capacity was accustomed to visit the plaintiff's store. On the occasion of one of his visits the subject of the purchase of a Victrola was brought up by one of plaintiff's salesmen. Fertig was asked if he had decided to purchase a Victrola, to which he replied: "No, we haven't reached a point where we will decide on it." The salesman suggested sending one out on approval, to which Fertig replied: "If you want to take a chance, and send it out on approval, with the understanding I don't have to purchase it unless I want it, all right." To this the salesman replied: "All right, I will send it out with a selection of records, and see if we can't later sell you the machine."

They then selected a Victrola of the price of $150, which seems to have been fully understood, and the machine was delivered to Fertig. The salesman testified that some time later he asked Fertig if he had decided to purchase, to which Fertig replied: "We haven't quite decided to purchase the machine." To which the salesman replied: "All right; let us know when you are ready." It further appears that Fertig moved the machine to the Lenox Hotel, where he went to live, and while there sold and delivered the Victrola to the defendant in this action, who paid Fertig $75 therefor. Fertig then left, and has not since been seen.

The plaintiff, learning the facts, and claiming to own the machine, demanded it of the defendant, who refused to deliver it up. The plaintiff then brought this action in the City Court to recover possession. The City Court dismissed its complaint, and the case now comes before this court on appeal.

The plaintiff, in substance, contends there never was any consummated sale; that the title of the property never passed to Fertig, and he could give none to the defendant; that Fertig stole or converted the Victrola to his own use, and the plaintiff should have recovered. The defendant contends he is protected as a bona fide purchaser for value under the provisions of the Personal Property Law, and that the court below did not err in dismissing the plaintiff's complaint.

The defendant stands on the provisions of section 129 of that act, as added by Laws 1911, c. 571, providing: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." It

seems to us that this section governs the case here presented for review.

If we correctly interpret the transaction between the plaintiff and Fertig, it amounted to this: The plaintiff delivered to Fertig the Victrola in question for trial, with the option to purchase it at the price of $150. This offer was at no time canceled or recalled by the plaintiff. There was evidently, under this arrangement, no actual sale, and no transfer of title to Fertig, until he had accepted the offer, or until he did some act in relation thereto "inconsistent with the ownership of the seller." The instant Fertig undertook to sell the machine as his own, he did an act inconsistent with the ownership of the plaintiff. It was evident that he had, in fact, acted upon the plaintiff's option to sell, and, in the absence of fraud, it became a consummated sale between the parties to it. Under such circumstances, I think there can be no question but what the plaintiff would have had a perfect right to have sued and recovered from Fertig the agreed purchase price of the machine.

Section 100 of the Personal Property Law also provides: "When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer— (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction." * * *

It is urged, and with force, that the act of Fertig in selling the Victrola to the defendant was not, after all, an act affirming or accepting the right to purchase at an agreed price, but really a conversion or larceny of the property delivered to him, and therefore ought not to defeat the right of the plaintiff to follow the property into whosesoever hands it may be found.

We think, however, the provisions of the Personal Property Law above quoted were designed, not only to define the rights of parties to such transactions as between themselves, but also to afford protection to third persons who may deal with the buyer on the strength of his apparent ownership of the property possessed, so that any one intrusting another with the possession of property under circumstances such as in this case does so largely at his own risk, while an innocent purchaser dealing with one in possession will be fully protected. * * *

I am of the opinion that the judgment appealed from should be affirmed. * * *

SECTION 3.—CONDITIONAL SALES

Purpose and Nature.—In these days of installment buying there is no form of commercial transaction more important than the conditional sale contract. The situation is this: The buyer wants to buy, and the seller is willing to sell, on credit. The problem is how best to secure the seller for the future payment of the purchase price. This might be done, and often is, by the seller's making an absolute sale of the goods,

delivering title and possession of the goods sold to the buyer, and taking back a chattel mortgage on the goods to secure payment. Business finds an objection to this method, however, in the trouble caused by the legal formalities of foreclosure necessary before the seller can get the title to the goods back in himself, where the buyer defaults in his payment.

By the conditional sale contract, on the other hand, although the buyer gets possession of the goods purchased, he does not get title. The property in the article sold remains in the seller until the agreement as to payment has been carried out. Thus, on a default in payment the seller need only repossess himself of the goods, the title remaining in him all the time. The essence of the conditional sale contract is that, by the expressed intention of the parties, title remains in the seller until payment of the purchase price. This is but an application of the rule that title will pass, or fail to pass, according to the intention of the parties.

It remains to consider the rights and duties of buyer and seller in a conditional sale contract.

Risk of Loss.—The general rule is that risk of loss follows title; that is, whoever has the property in the goods at the moment of the loss suffers the damage. The conditional sale, however, presents an exception to this rule, for here the risk of loss is upon the buyer. The reason is that, although the seller retains title, it is for the special purpose of security alone; the real ownership is in the buyer, and therefore he should suffer in case of any loss.

Rights of Seller.—As stated, the purpose of the conditional sale is to constitute security to the seller for the payment of the price by retaining title in him. Thus, if the buyer, before payment, should sell the goods to an innocent purchaser, such purchaser would get no title. In this connection it should be noted that some states have statutes providing that all conditional sales contracts must be recorded to make them effective against purchasers from a conditional vendee, and that, where there is a failure so to record, an innocent purchaser from such conditional vendee, without actual notice of the conditional sale agreement, gets good title to the goods.

CHAPTER 3

TRANSFER OF TITLE IN SALES OF UNASCERTAINED GOODS

SECTION 1.—WHERE INTENTION TO EFFECT A PRESENT SALE IS EXPRESSED

1. General Rule

Uniform Sales Act, § 17.—*Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.*

HAHN et al. v. FREDERICKS.

Supreme Court of Michigan, 1874. 30 Mich. 223, 18 Am. Rep. 119.

[Action by Fredericks to recover the sale price of 200 cords of wood destroyed by fire. Hahn had contracted to buy from Fredericks 200 cords of hard wood out of a pile of between 350 and 400 cords stacked together on the edge of Portage Lake. The parties agreed that title to the 200 cords purchased was to pass immediately to the buyer, and that Hahn, the buyer, was to select his wood from the pile and haul it away. It appeared from the evidence that there was some soft wood mixed in with the pile. A fire destroyed all of the wood before there was any withdrawal.

It was contended by the plaintiff that title to the 200 cords of hard wood in question, even though unascertained, had passed to the buyer by virtue of the agreement, and that, since risk of loss follows title, Hahn was liable for the purchase price.]

Campbell, J. * * * The principal question in the case seems to be whether the sale actually attached to any two hundred cords which could be identified before the fire. * * * Until an actual measurement, which was to be made when the hard wood was removed from the piles and as it was placed on the scows, it is evident that there could be no parcel identified to which as sale could attach as complete. It was a bargain for a parcel yet to be measured out of a larger parcel of various qualities, and of an extent not determined. * * *

We have found no authority which recognizes such a transaction as a completed sale. It was not a sale in gross of an entire parcel of wood, where the measurement was only necessary to ascertain the quantity, as in Adams Mining Co. v. Senter, 26 Mich. 73. Here the measurement was necessary to complete the identification, and to determine what wood was to belong to the purchaser. Under such an arrangement, it is well

settled that no title passes to any portion of the property until it has been measured and thus identified and severed from the rest. * * *

The judgment below must be reversed. * * *

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2. The Exception in the Case of Fungible Goods

Uniform Sales Act, § 6.—*In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass.*

KIMBERLY et al. v. PATCHIN.

Court of Appeals of New York, 1859. 19 N. Y. 330, 75 Am. Dec. 334.

[Action for damages for defendant Patchin's interference with and conversion of certain wheat to which the plaintiff, Kimberly, claimed title. Defendant maintained that his possession of the wheat was not wrongful, for the reason that the title thereto was in him and not in the plaintiff.

The evidence showed the facts as follows: One Dickinson owned two piles of wheat which were stored in a warehouse, amounting in all to 6,249 bushels. Dickinson sold 6,000 bushels to Patchin, defendant herein, without then separating the amount sold from the mass, and signed a memorandum of sale to that effect. Then, before delivery of the 6,000 bushels to Patchin, Dickinson sold all of the wheat in the warehouse to the plaintiff, Kimberly. Patchin got possession of the wheat.

The sole question in this case was whether it was possible for title to an unascertained 6,000 bushels to pass to Patchin by the contract of sale.]

Comstock, J. * * * The quantity of wheat in store to which the contract related was estimated by the parties at about 6,000 bushels. But subsequently, after Dickinson made another sale of the same wheat to the * * * plaintiffs, * * * it appeared on measurement that the number of bushels was 6,249, being an excess of 249 bushels. * * * When [defendant] bought the 6,000 bushels, that quantity was mixed in the storehouse with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the 6,000 bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, * * * that the parties intended a transfer of the title. The argument is, and it is the only one which is even plausible, that the law overrules that intention. * * *

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguished by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things unless they are ascertained and distinguished from all other things; and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title the articles must, if not delivered, be designated so that possession can be taken by the purchaser without any further act on the part of the seller.

But [there are some things in which title] can be acquired and held * * * which are incapable of such an identification. * * * Of this nature are wine, oil, wheat, and the other cereal grains, and the flour manufactured from them. * * * In respect to such things, * * * where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is [sufficiently ascertained so the title may pass immediately]. * * *

We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant * * * acquired a perfect title to the 6,000 bushels of wheat. Of that quantity he took possession at Buffalo, by a writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought and it results that the plaintiff cannot recover. * * *

Judgment reversed and new trial ordered.

GOURD v. HEALY.

Court of Appeals of New York, 1912. 206 N. Y. 423, 99 N. E. 1099.

[Action by Henry E. Gourd against Thomas Healy. From a judgment of the Appellate Division, affirming a judgment of the Trial Term, dismissing the complaint, plaintiff appeals.]

WERNER, J. This action, which has been twice tried, was brought to recover the purchase price of 50 cases of wine. The original complaint contained the usual averments where there has been a bargain and sale, but no delivery, and the answer was, in substance, a general denial. * * *

There is no dispute over the fact that on the 26th day of May, 1906, the plaintiff sold to the defendant 50 cases of wine at the agreed price of $740, which was to be billed November 1, 1906, at four months, thus fixing the 1st day of March, 1907, as the day of payment; and that meanwhile the plaintiff was to hold the wine subject to the shipping instructions of the defendant. * * *

It is contended, however, that the title to the wine never passed from the plaintiff to the defendant, because at the time of sale, and until the close of the correspondence in December, 1907, the wine had not been segregated from the larger mass of which it formed a part in an unidentified cellar in Bordeaux, France; and that is the position taken by the Appellate Division. What has been said concerning the tender of the goods seems to answer this contention. Even if it were true that the title to merchandise which forms part of a larger quantity does not pass to the purchaser until it is separated from the mass, the dealings between these parties were such as to relieve the plaintiff from the duty of segregation. But this property was of a species in which there may be a transfer of title, even when it remains an integral part of a larger bulk. Ordinarily articles of personal property must, if not delivered, be so designated that possession can be taken by the purchaser without any further act on the part of the seller. That is the rule in the sale of a horse, a table, or any other article having a distinct and separate identity as the particular thing sold. It is different, however, when the thing sold is coal, wine, oil, or wheat, which is to be taken in a specified quantity or bulk from a larger mass.

Property may be acquired and held in many things which are incapable of more specific designation than a reference to their kind, quality, or other general description. "Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure, or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality." Kimberly v. Patchin, 19 N. Y. 330, 333 (75 Am. Dec. 334). Here the thing sold was wine described as Chateau Yquem of the vintage of 1901, and the quantity was to be 35 cases of quarts and 15 cases of pints. Any 50 cases of this kind of wine in the specified number of quarts and pints would have answered the description in this contract. Upon the last trial it appeared that this wine was in the cellars of Schroeder and Schyler, Bordeaux, when the contract was made, and that it remained there until it was shipped to the plaintiff in April, 1910; and, in view of the nature of the property and the dealings between the parties, we think that is precisely the same as though the wine had been in the cellar of the plaintiff from the beginning. * * *

The judgment should be reversed and a new trial ordered. * * *

SECTION 2.—PRESUMPTION, WHERE INTENTION NOT EXPRESSED

When Are Goods Unascertained.—Goods are unascertained:
(1) When they are not in existence at the time of the contract; and
(2) When the goods are in existence, but are mixed with other goods and it is yet to be determined what particular goods will finally be delivered to the buyer.

Uniform Sales Act, § 19, Rule 4 (1).—*Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.*

When Title Passes.—The above section of the act makes it plain that in the case of unascertained goods title does not pass as soon as the goods are ascertained, unless the intention of the parties be very clearly expressed to that effect. The legal presumption, as stated in rule 4, operative in the absence of an expressed intention, requires a further act to pass title, namely, an *unconditional appropriation to the contract*. Thus the question to be considered is: What acts on the part of the seller will amount to an unconditional appropriation?

1. Acts of Appropriation in Sales of Unascertained Goods

MITCHELL et al. v. LE CLAIR.

Supreme Judicial Court of Massachusetts, 1896. 165 Mass. 308, 43 N. E. 117.

Contract, upon an account annexed, to recover the price of sixty tubs of butter sold by the plaintiffs to the defendant. Trial in the superior court, without a jury, before Richardson, J., who allowed a bill of exceptions, in substance as follows:

The plaintiffs are wholesale butter dealers in Boston, and the defendant is a grocer in Southbridge. On September 6, 1893, the defendant visited the store of the plaintiffs inquiring the price of butter. The plaintiffs offered to sell to the defendant sixty tubs of butter, of the same kind and quality as that previously bought by the defendant from the plaintiffs, for twenty-seven cents per pound, cash, provided he accepted before twelve o'clock on the following day. The defendant before twelve o'clock on the following day, by telegram, accepted the offer. The plaintiffs testified that, immediately upon the acceptance of the offer, they went to the public storage warehouse, where they had

large quantities of butter stored, and picked out sixty tubs of butter, weighed it, set to one side, and marked each tub for the purpose of designating it as the butter of the defendant, and at once sent a bill of all of it to the defendant, marked "Cash on demand." The defendant had no notice whatever of this selection, setting aside, and marking of sixty tubs of butter, except the receipt of the bill. There was no evidence introduced to show that the kind or quality of the butter thus set aside was or was not of a similar grade or quality as that sold the defendant before. No objection was ever made by the defendant to paying for any of it on the ground that it was not of the quality or kind of butter purchased. Afterward, the defendant at different times directed shipments to be made by the plaintiffs, of the butter so bought by him, and the same was shipped, to the amount of forty tubs, and accepted without any objection, and paid for. The plaintiffs testified that these forty tubs were taken from the lot set aside as stated above; but of this fact the defendant had no knowledge, except from the bill sent at the time of purchase, which enumerated the separate weight and tare of each tub of butter.

In March, 1894, the defendant directed the plaintiffs to ship to him the remaining twenty tubs of butter. This the plaintiffs refused to do until they had first received the pay for them, claiming that the sale was for cash on demand, and demands for payment having been previously made. The defendant did not understand these to be the terms; but did understand that he was to receive delivery of the butter, and pay for it during the three months succeeding September 26, 1893. The price of butter declined in the market soon after the agreement was made. The plaintiffs still have the butter on storage, subject to the order of the defendant when he pays for it. The defendant asked the judge to rule "that the selection, setting aside, and marking the sixty tubs, as testified to by the plaintiffs, could not be considered a delivery, the defendant neither having knowledge of such action nor assenting thereto, expressly or by implication; and "that the plaintiffs had failed to make out their case, in that there was no evidence that the butter selected, set aside, and marked, as aforesaid, was of the kind and quality ordered."

The judge refused to rule as requested; found that, by the agreement, the defendant was to take all the sixty tubs, and pay for it within three months from September 26, 1893; and that the plaintiffs made several demands upon the defendant, before and after the expiration of the three months, to take the rest of the butter and pay for it, and found for the plaintiffs. The defendant alleged exceptions.

KNOWLTON, J. The principal question in this case is whether there was a sufficient delivery of the butter to pass the title as between the parties. There is no dispute that there was a good contract of sale, and no question arises under the statute of frauds.

The defendant accepted by telegram the plaintiffs' offer to sell him sixty tubs of butter of a specified quality at twenty-seven cents per pound. The plaintiffs had in their storehouse a large quantity of butter. Upon receipt of the defendant's telegram accepting their offer, they were impliedly authorized, as the defendant's agents, to set apart and ap-

propriate to him the goods called for by the contract. This they immediately did, weighing the butter, setting it apart, and marking each tub for the purpose of designating it as the defendant's property. They then at once sent him a bill of all of it, marked, "Cash on demand." This completed the sale and passed the title. * * *

[Judgment for plaintiffs.]

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2. Delivery to Carrier as Act of Appropriation

Uniform Sales Act, § 19, Rule 4 (2).—*Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalent.*

DENTZEL v. ISLAND PARK ASS'N et al.

Supreme Court of Pennsylvania, 1911. 229 Pa. 403, 78 A. 935, 33 L. R. A. (N. S.) 54.

[This was an action by the seller of a machine to recover possession thereof from the buyer for nonpayment of the purchase price. The seller's right to maintain this action and get back possession of the machine depends upon whether title remained in him or whether title has passed to the buyer. It appeared from the evidence that by the contract the buyer agreed to pay $5,000 for the machine as follows: $250 on signing the agreement, $2,500 upon erection of the machine, and the balance in notes maturing at some later time. The buyer further agreed to pay the freight. The seller was to furnish a man to erect the machine at its place of destination and to put it in order for operation. The said machine was shipped as stipulated, "f. o. b. cars, Philadelphia."]

Stewart, J. * * * It is a general rule, not to be questioned, that when the contract in a sale of personal property calls for delivery f. o. b. at some particular place, and the seller there delivers the article in accordance with the stipulations, the title to the property at once passes to the buyer, unless otherwise provided. * * * The rule yields where the contract reserves to the seller the right of property notwithstanding the delivery to the carrier. Since delivery is after all a matter of intention on the part of the seller, even though the contract calls for delivery f. o. b. cars at a designated place of shipment, the seller may, before the delivery on board the cars, stipulate with the carrier that the latter is to carry it for him, thereby making the carrier the seller's agent in receiving the property. This follows when the seller takes from the

carrier a bill of lading which secures the shipper against delivery, at the point of destination, to anyone except upon his order. When the contract, however, as here, shows an agreement to deliver f. o. b. with nothing to qualify it, the law will presume a delivery to have been in accordance with the stipulations, and cast the burden on the seller if he assert the contrary. There is not a particle of evidence in the case that this burden was discharged. * * *

We now reverse the judgment on the verdict, and enter judgment for the defendant.

CITY OF CARTHAGE v. DUVALL.

Supreme Court of Illinois, 1903. 202 Ill. 234, 66 N. E. 1099.

[This was an action by the city of Carthage against the defendant, agent of the American Express Company, for violation of a city ordinance which declared illegal all sales of intoxicating liquor within the jurisdiction of the city. The case was presented on an agreed statement of facts from which it appeared that one Skidmore, a resident of Carthage, had ordered a gallon of whisky from a distillery in Burlington, Iowa, to be shipped to him at Carthage C. O. D. The liquor was shipped by express and delivered to Skidmore by the express agent at Carthage, the defendant herein. It is alleged that title passed upon delivery by the carrier to the buyer, and collection by the carrier of the purchase price, and that therefore it was a sale by the defendant in violation of the city ordinance.]

HAND, J. The general rule frequently announced by this court is, that the delivery of personal property by the seller to a common carrier to be conveyed to the purchaser is a delivery to the purchaser, and that the title to the property vests in the purchaser immediately upon its delivery to the carrier. * * * Whether such rule applies where the property is consigned C. O. D. is an open question in this court, but upon principle and authority, where, as here, everything which the seller has to do with the property has been done at the time it is delivered to the carrier, we see no reason why the title does not vest in the purchaser immediately upon its delivery, although it is consigned C. O. D. * * * The cases that hold the title to the property vests in the purchaser upon a C. O. D. consignment, place such holding upon the ground that the carrier is the agent of the purchaser to deliver the property and the agent of the seller to collect and return the purchase price, and that the only interest of the seller in the property after its delivery to the carrier is a lien for the purchase price.

From an examination of the authorities cited in the briefs, and such other authorities as we have been able to find bearing upon the subject, we have reached the conclusion that the sale to Skidmore was completed when the liquor was delivered to the express company in Burlington, and that no sale of liquor was made by the defendant to Skidmore in the city of Carthage.

[Judgment for defendant affirmed.]

3. Where Delivery to Buyer is Necessary to Pass Title

Uniform Sales Act, § 19, Rule 5.—*If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the cost of freight or transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.*

SMITH CO., Limited, v. MARANO.

Supreme Court of Pennsylvania, 1920. 267 Pa. 107, 110 A. 94, 10 A. L. R. 697.

[Action by Smith Company, Limited, against Antonio Marano. Judgment for plaintiff, and defendant appeals.]

Brown, C. J. The facts in this controversy are agreed upon in a case stated. Smith Company, Limited, is a corporation, with its place of business in the city of St. Johns, Newfoundland. The defendant is a resident of the city of Philadelphia, this state, and is engaged in business there. In September, 1916, the plaintiff and defendant, by letters and telegrams, endeavored to complete a contract for the sale of codfish to the latter. As a result of preliminary negotiations, on September 26, 1916, plaintiff made the following offer to the defendant, by telegram: "Will give you first quality at nine dollars, second quality at eight dollars per drum of one hundred pounds c. i. f. Philadelphia." On the following day the defendant wired his acceptance of 1,000 drums of the fish, first quality, and by letter of the same date directed the plaintiff to send with the first shipment of that quality 25 drums of the second quality. On or about October 4, 1916, the plaintiff shipped 300 drums of the fish of first quality and 25 of second quality, in accordance with the terms of the contract. The goods were shipped by a steamer from the city of St. Johns, consigned to the plaintiff's agent at New York, for transshipment to Philadelphia, to be delivered to the order of plaintiff, the bill of lading being indorsed by the plaintiff in blank. Under the terms of the contract, the plaintiff paid for the customary marine insurance on the goods shipped and the freight charges on them to Philadelphia. It immediately forwarded to the Girard National Bank of Philadelphia, through a bank in New York, the insurance policy, indorsed in blank, the invoice and a through bill of lading, also indorsed in blank, all attached to a sight draft on the defendant, in accordance with the contract between them, the draft being for $2,900, covering the value of the fish shipped. About two days later the ship carrying the fish shipped by the plaintiff to the defendant was sunk by a submarine of the Imperial German government, on the high seas, while en route to the port of destination, and the goods in question were totally destroyed. The bill of lading and the sight draft were duly tendered to the defendant after the cargo had been destroyed. He refused to accept the draft, and subsequently

refused to pay any part thereof. The parties agree that the expression "c. i. f." means that the price quoted by the plaintiff to the defendant, and accepted by him, included the cost of the goods, the cost of obtaining customary insurance thereon, and the freight charges to the city of Philadelphia. On the foregoing state of facts the court below entered judgment in favor of the plaintiff for the full amount of its claim.

The letters "c. i. f." are abbreviations of the words "cost, insurance, and freight," and when used in connection with commercial quotations signify that the price to be paid for goods will include all charges to the port of destination. * * * The case now under consideration calls upon us for the first time to construe what may be termed a "c. i. f." contract for the purchase of goods, and to determine when, under such contract, there is delivery to the buyer. As just stated, plaintiff and defendant agree that the term "c. i. f." means that the price quoted to the latter and accepted by him included "the cost of said goods, the cost of obtaining the customary insurance thereon, and freight charges to the city of Philadelphia." In recognizing that such is the true meaning of the abbreviations, the English courts hold that property purchased under a contract in which they are used passes to the buyer upon the seller's delivery of it to a carrier. * * * A concise statement of the rule is thus made by Mr. Justice Hughes in Thames & Mersey Marine Insurance Co., Limited, v. U. S., 237 U. S. 19, 35 S. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087: "The requirements of exportation are reflected in the familiar 'c. i. f.' contract (that is, at a price to cover cost, insurance, and freight), which has 'its recognized legal incidents, one of which is that the shipper fulfills his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and a policy of insurance with a credit note for the freight, as explained by Lord Blackburn in Ireland v. Livingston.' L. R. 5 H. L. 395–406. * * *"

Counsel for appellant admit that the judgment of the court below is in accord with the English decisions, followed in this country by the two cases cited, but their contention is that, under the Pennsylvania Sales Act of May 19, 1915 (P. L. 543), the property purchased by the defendant was never delivered to him, and the plaintiff is therefore not entitled to recover. The pertinent parts of that act are as follows: * * *

"Sec. 19. Unless a different intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: * * * Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The appellant agreed to pay to the appellee a fixed price for the goods to be shipped to him. The price quoted to him, and which he agreed to pay, included not only the actual value of the fish to the seller, but insurance and freight charges to Philadelphia. If the

price had not include insurance, it might be well urged that, under rule 5 of section 19 of our Sales Act, the goods were never delivered to the appellant; but, reading the contract as a whole—as it must be read—with the item for insurance included in it, "a different intention" on the part of the buyer is disclosed, * * * and that he must now be held to have understood that the delivery of the goods to the common carrier was a delivery to him, are clearly demonstrated by the court below in the following from its opinion directing judgment to be entered against him: * * * "No matter what is to be inferred from the reference to freight, the inference from that to insurance must also have weight. The contract must be interpreted as a whole. Both provisions must be explained, interpreted, and given their due force. A provision for the payment of freight by the seller or its inclusion in the price might indicate an intention to deliver at the end of the voyage, or it might be a consideration affecting the price merely, and the cost and uncertainty of the freight charge might be a burden accepted by the seller to expedite the sale. On the other hand, the provision with regard to insurance was either fully intended, and reasonable because of the risk the buyer intended to assume, or, if he did not so intend, it was entirely meaningless and mere surplusage." * * *

The bill of lading, made out to the appellee or its order, was indorsed immediately by it in blank, and attached to the draft drawn upon the appellant. This merely meant that the appellee intended to retain property in the goods to secure performance by the defendant of his promise to pay for them, and did not, by the express words of the Sales Act, relieve him from the risk that was upon him from the time the goods were delivered to the carrier.

Judgment affirmed.

WESTMORELAND COAL CO. v. SYRACUSE LIGHTING CO.

Supreme Court of New York, Appellate Division, Fourth Department, 1913. 159 App. Div. 323, 145 N. Y. S. 420.

[Action by the Westmoreland Coal Company against the Syracuse Lighting Company. From a judgment for defendant, plaintiff appeals.] Plaintiff sought to recover in this action the purchase price of two canal-boat loads of coal shipped by it to the defendant. * * *

ROBSON, J. The parties to the contract * * * contemplated that plaintiff in fulfillment of the contract would ship the coal therein mentioned by rail from plaintiff's mines to Watkins, N. Y. It was to be there loaded on canal boats, and thence taken by boat to Syracuse, N. Y., and there delivered alongside defendant's dock as theretofore, plaintiff having furnished defendant with coal under prior contracts between the parties. The two boats with their loads of coal, which are the subject of this action, reached Syracuse and approached to within 300 or 400 feet of defendant's dock, which was on the north, or towpath, side of the canal. They could not at once be docked and un-

loaded because two other boats then occupied the dock. These latter boats contained coal theretofore delivered by plaintiff under its contract; and their cargoes were then being unloaded by defendant. For this reason and also (as the evidence shows and the trial justice finds) "because the rules governing traffic upon the canal required it, the two boats in question were moved over to the south side of the canal nearly opposite defendant's dock to await their turn for being unloaded, until the unloading of the boats already at the dock was completed."

Notice of the arrival of the boats was given to defendant, the circumstances of which and of the casualty, which thereafter ensued causing the total loss of the coal, are succinctly stated in the findings, as follows: "That upon the arrival of the said two boats carrying the coal in question in this action at said point, 300 or 400 feet west of the defendant's dock, as above stated, the captain and man in charge of the boats notified the defendant of their arrival, and the defendant entered said boats as having arrived at the dock at 12 o'clock noon on July 30, 1907, in its books kept for that purpose. That at about 2 o'clock on the same day, a break occurred in the banks of the Erie Canal a short distance west of the defendant's dock, and, without any fault on the part of the plaintiff, the boats with the cargoes of coal in question were drawn into the said break and lost." * * *

If the coal in question had not been in fact delivered to the defendant before it was lost, then the carrier still remained the agent of plaintiff for the purpose of making delivery of it under the contract. It is clear that the carrier's duty in making the delivery had not at that time ended. He still had to place the boats alongside defendant's dock. This he had not in fact done, though the boats at one time had approached within a few hundred feet of the dock. It is true that had the dock, at the time, not been completely occupied with other boats, which were then unloading, he would have done so. But defendant was not responsible for this delay in laying the boats alongside the dock. The boats already at the dock were discharging their cargoes of coal, which plaintiff, by its carrier in control of those boats, had previously delivered to defendant under the contract. Plaintiff was fully advised before the contract was made that the capacity of the dock was limited, so that only two boats could be there unloaded at the same time. There is no question that defendant was diligent in unloading the boats then at its dock. The arrival of the two boats, concerning which this controversy has arisen, before the dock was cleared for their reception, was due only to the carrier's management of their transportation. The carrier for this purpose was plaintiff's not defendant's agent. Taking them to the side of the canal opposite defendant's dock and tying them up where they were afterwards lost was the carrier's act. Defendant gave no direction as to their management, or what should be done with them. The entry on defendant's books of arrival of the boats did not in fact indicate actual delivery to nor receipt by the defendant; but was, as the evidence shows, simply a concession to plaintiff's interest for the sole purpose of fixing a time

from which subsequent possible claims of boat captains against plaintiff for demurrage could be corrected and verified.

It is suggested that when plaintiff placed the coal on these boats there was an appropriation of it in fulfillment pro tanto of the executory contract for delivery of coal. While this may have been an actual appropriation by plaintiff to that end, yet it did not complete what it had agreed to do before title passed to the defendant. Delivery of the coal was as much a part of its duty as actual selection and appropriation of it. Delivery of the coal at the place specified in the contract was required to be made, and then only would the defendant's assent to such appropriation in part fulfillment of the contract be established. Delivery was not made. Therefore title had not passed to defendant. * * *

By subdivision 5 of section 100 of the Personal Property Law (Consol. Laws, c. 41, * * * added by chapter 571, Laws 1911) the effect of a provision in a contract of sale requiring the seller to deliver to the buyer the goods sold is declared to be, presumptively at least, that the property therein does not pass to the latter until the goods have been delivered to him, or reached the place agreed upon.

The judgment should be affirmed, with costs. All concur, except KRUSE, P. J. (dissenting). The practical question here is which of the parties shall bear the loss of the two boat loads of coal, which were lost owing to a break in the canal occurring while the boats were waiting to be unloaded, the plaintiff, the seller, or the defendant, the buyer? The solution of that question does not depend upon whether the plaintiff had delivered the coal alongside the dock, within the meaning of the contract. That is a mere circumstance to be taken into account in determining the controlling question as to whether the title to the coal had passed to the defendant before it was lost, or still remained in the plaintiff. If there was an appropriation of the specific coal to the contract, assented to by the defendant after the coal reached Syracuse, as I think should be found as a fact from the evidence, the title passed to the defendant, and the loss must fall upon it. Even if the evidence is sufficient to make that question one of fact, I think it should be found in favor of the plaintiff.

It may be, as defendant's counsel contends, that the record of arrival of boats was kept by the defendant to protect the plaintiff against unfounded claims for demurrage, but the record and surrounding circumstances also establish that the defendant knew that this particular coal had been set apart to it under the terms of the contract and was clearly identified by both the buyer and the seller. Not only did the defendant know the precise time and place of arrival of the coal, but a record of the quantity, as well, was made by it. The identification of the coal as the subject of the sale was complete.

Although the contract was originally executory, it was as to the coal in question so far executed before it was lost as to pass the title. As regards the passing of the title, it was in effect the same as though the coal had been set apart and identified as the subject of the sale at the time of the making of the contract. The subsequent appropriation of

the coal to the contract was sufficient to pass the title to the defendant. * * * Although the coal may not have been delivered alongside the dock within the meaning of the contract, that was made impossible by a cause for which the plaintiff was not responsible, and if the title thereto had passed before the break in the canal, as I think it had, the loss of the coal should fall upon the defendant. * * *

CHAPTER 4

WARRANTIES OF THE SELLER

SECTION 1.—EXPRESS WARRANTIES

1. In General

Uniform Sales Act, § 12.—*Any affirmation of fact, or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the buyer's opinion only shall be construed a warranty.*

What Constitutes a Warranty.—The incidents of a warranty are: (1) It may consist either of an affirmation or a promise. The affirmation relates to some existing attribute of the subject-matter of the sale, whereas the promise relates to some future fact which the warrantor agrees to bring into existence. (2) The promise or affirmation must be of a fact and not of an opinion. (3) The promise or affirmation must be such as would naturally tend to induce the buyer to purchase the goods. (4) There must be shown a reliance on the part of the buyer upon the promise or affirmation. All four incidents must be proven in order to show a breach of warranty.

Warranty Distinguished.—A warranty differs from a condition, in that its breach does not usually entitle the purchaser to rescind, but gives him a right to demand damages from the seller. Warranty broken differs from fraud, in that in the latter case the false affirmation of fact is knowingly made, whereas in the former the seller may be perfectly honest in his misstatement and still be liable for breach of warranty.

Buyer's Remedy for Breach of Warranty.—The buyer cannot rescind the contract for a breach of warranty. His remedy is to retain the goods and sue for the difference between their actual value and their value had they been as warranted, or to use the breach of warranty as a set-off and counter-claim when sued for the price. Acceptance of the goods does not bar the buyer's right to damages for breach of warranty or other term in the contract.

2. The Affirmation of Fact

HOBART v. YOUNG.

Supreme Court of Vermont, 1891. 63 Vt. 363, 21 A. 612, 12 L. R. A. 693.

The evidence of the plaintiff tended to show that in early June, 1888, he purchased a pair of horses, of which the horse in question was one; that he first saw these horses in May; that about the 1st of June he rode after them with the defendant; and that the defendant then warranted them to be sound. * * * The bill of sale which the plaintiff signed was as follows: "Alburgh, June 5, 1888. J. W. Hobart bo't of Sumner Young, Esq., one pair of black (Pilot) geldings, sound and kind, $487.50 to be delivered on the cars at the depot with good halters, duties paid, and certificates of the same attached hereto. Rec'd. payment. S. Young." * * *

Rowell, J. * * * An important question is whether the words "sound and kind," contained in the bill of sale, constitute an express warranty as matter of law. The law of warranty has undergone much change since Chandelor v. Lopus, Cro. Jac. 4, decided in the Exchequer Chamber in 1803. It was there held that an affirmation that the thing sold was a bezoar stone was no warranty; for, it was said, every one, in selling his wares, will affirm that they are good, or that the horse he sells is sound; yet, if he does not warrant them to be so, it is no cause of action. But latterly courts have manifested a strong disposition to construe liberally in favor of the purchaser what the seller affirms about the kind and quality of his goods, and have been disposed to treat such affirmations as warranties when the language will bear that construction, and it is fairly inferable that the purchaser so understood it. * * * And now any affirmation as to the kind or quality of the thing sold, not uttered as matter of communication, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase if so received and relied upon by the purchaser, is deemed to be an express warranty. And in cases of oral contracts it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not. * * *

But when the contract is in writing it is for the court to construe it, and to decide whether it contains a warranty or not; * * * And by the great weight of recent authority positive statements in instruments evidencing contracts of sale, descriptive of the kind, or assertive of the quality and condition of the thing sold, are treated as a part of the contract and regarded as warranties if the language is reasonably susceptible of that construction, and it is fairly inferable that the purchaser understood and relied upon it as such.

Thus, in Hastings v. Lovering, 2 Pick (Mass.) 214, 13 Am. Dec. 420, the sale note described the article as "prime quality winter sperm oil." The plaintiff declared in assumpsit on a warranty, and had judgment.

In Henshaw v. Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367, the bill of particulars affirmed the article to be indigo. The court said that that imported an express warranty if it was so intended, and that it must be taken to have been so intended, as there was no evidence to the contrary. In Brown v. Bigelow, 10 Allen (Mass.) 242, a case exactly in point, these very words, "sound and kind," were held to constitute a general warranty of soundness. In Gould v. Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455, a bought and sold note described the article as "Ceara scrap rubber as per sample, of second quality." The court said that it did not admit of doubt that the note was intended to express the terms of the sale, and that the contract of the parties was to be found in what was thus written, read in the light of the attendant circumstances. Held a warranty that the rubber was of second quality, and that the fact that the plaintiff made such examination of it as he pleased did not necessarily do away with the warranty.

Osgood v. Lewis, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317, is a leading case on this subject. There the bill of particulars contained a statement that the article was "winter-pressed sperm oil," and the question was whether those words were per se a warranty; and it was held that they were, for it was said they could not be regarded as mere matter of opinion or belief, but as the assertion of a material fact that the defendant assumed to know and to warrant the existence of. In Kearly v. Duncan, 1 Head (Tenn.) 397, 73 Am. Dec. 179, the words, "said negroes, sound in body and mind," contained in a receipt for the price paid for them, were held clearly to constitute a warranty of soundness. The words, "being of sound mind and limb, and free from all disease," in a bill of sale of slaves, were held a warranty in Cramer v. Bradshaw, 10 Johns. (N. Y.) 484.

This case is criticized by Bennett, J., in Foster v. Caldwell's Estate, 18 Vt. 181, who would treat the words as a mere representation, descriptive of the property sold. But that case seems to have stood the test in New York, while Seixas v. Woods, 2 Caines, 48, 2 Am. Dec. 215, and Swett v. Colgate, 20 Johns. 203, 11 Am. Dec. 266, to which he refers, and which held that no warranty arises from a description of the kind of property sold, have been expressly overruled by Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595, as not properly applying the doctrine that they correctly announce, wherein a contrary application is made, and wherein it is held that there is no distinction in principle between a representation as to quality and condition and a representation as to kind and character. And in 1 Smith, Lead. Cas. (7th Am. Ed.) 341, it is said that such a distinction is too refined to be practicable.

In Yates v. Pym, 6 Taunt. 446, a description of bacon in a sale note as "prime singed" was held to be a warranty that it was prime signed. So in Bridge v. Wain, 1 Starkie, 504, the goods sold were described in the invoice as "scarlet cuttings." Held a warranty that they answered the known mercantile description of scarlet cuttings.

The advertisement of the sale of a ship described her as a "copper-fastened vessel," whereas she was only partially copper-fastened, and not what was called in the trade a "copper-fastened vessel." Held a warranty that she was copper-fastened. Shepherd v. Kain, 5 Barn. & Ald. 240. A sold note described turnip seed as "Skirving's Swedes." Coleridge, J., said that there was no doubt that the statement was made by the defendant a part of the contract, and it was held to be a warranty that the seed was Skirving's. Allan v. Lake, 18 Q. B. 560.

In Wetherill v. Neilson, 20 Pa. 448, 54 Am. Dec. 741, the bill of sale described the soda ash as being of a certain strength, whereas it was of a less strength, and unmerchantable. Held no warranty. It is said in 1 Smith, Lead. Cas. (7th Am. Ed.) 343, that this case stands almost if not quite, alone, and cannot be reconciled with the general course of decisions in this country and in England. In Barrett v. Hall, 1 Aik. 269, the note was payable in "good cooking-stoves." The court said that no definite quality could be intended from the term "good," and that it imported nothing but opinion, and was no warranty, and referred to Chandelor v. Lopus, Cro. Jac. 4, for authority, which is no longer authority. But we do not say that the court was wrong in that case, for "good" is a very common term of praise in trade, and, as used in the note, ascribed no particular quality to the stoves, and might well be regarded, in that case, as mere matter of opinion or commendation, and as so understood by the parties. In Wason v. Rowe, 16 Vt. 525, the bill of sale said the horse was "considered sound." Held no warranty; and with good reason, for "considered" was no assertion of a fact, but a mere expression of opinion.

The more recent cases in this state recognize the general rule that positive statements of fact by the seller in respect of the kind or the quality of the thing sold that constitute a part of the contract or form its basis, and that are fairly susceptible of such a construction, are to be regarded as warranties. Thus in Beals v. Olmstead, 24 Vt. 114, 58 Am. Dec. 150, one of the reasons given why the defendant's statements ought to be regarded as warranties is that they were made positively, and concerning matters as to which he was supposed and professed to have knowledge. Therefore, it is said, he ought to expect to be bound by them. See, also, Drew v. Edmunds, 60 Vt. 401, 15 A. 100, 6 Am. St. Rep. 122; Enger v. Dawley, 62 Vt. 164, 19 A. 478.

It is sufficiently certain, as matter of construction, that the words, "sound and kind," found in the bill of sale before us, were intended by the parties to be a part of the contract of sale, and as such it would be unreasonable to construe them as an expression of mere opinion when they positively ascribe to the horses a condition and a quality that the defendant assumed to know they possessed, and that he had peculiar means of knowing, whether they possessed or not, while the plaintiff had no such means. We think the words, reading the instrument in the light of the attendant circumstances, clearly constitute an express warranty of soundness and that the chief judge was right in so holding.

Judgment affirmed.

BAIN v. WITHEY & OTTMAN.

Supreme Court of Alabama, 1895. 107 Ala. 223, 18 So. 217.

[This was an action for the purchase price of certain patent rights sold by plaintiffs to defendant. Bain defends on the ground of breach of warranty, that plaintiffs represented that they were the owners of a valuable patent right, and that they would sell and convey the same to him, authorizing him to make, sell, and lease the right to use said patent in certain counties, and further represented that said patent was a useful and beneficial invention; that said plaintiffs fraudulently concealed from the defendant that said patent was useless and worthless, while in fact said patent was of no value.]

COLEMAN, J. * * * Neither of the pleas set up a statement or representation as having been made by plaintiffs, as to the stability or durability of the fence, or its adaptability as a barrier to hogs, or to the cost of construction, or any fact characteristic of a fence made after the patent. The language of the plea in this respect is, that plaintiffs represented it "as a valuable and useful improvement," but unaccompanied by the statement of any fact which rendered it "valuable and useful." An expression of this character, made with reference to a patented improvement, standing by itself, not emphasizing a material fact, can be but the expression of an opinion, upon which a purchaser has no right to rely. * * * As stated by Benjamin on Sales, 316, "the vendor is at liberty to praise his merchandise, in order to enhance its value, if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspecting it, and no means are used for hiding the defects." A buyer may always protect himself by requiring a warranty of such matters as he is unwilling to take the risk on his own judgment. * * *

[Judgment for plaintiffs.]

SPENCER HEATER CO. v. ABBOTT.

Court of Errors and Appeals of New Jersey, 1918. 91 N. J. Law, 594, 104 A. 91.

[Action by the Spencer Heater Company against Randolph Abbott, trading, etc., as the Park Floral Company. Judgment for defendant, and plaintiff appeals.]

TRENCHARD, J. This action was brought on a mechanics' lien claim to recover the price of certain Spencer steam heaters furnished to the defendant, together with some smaller items of labor and expense.

The defendant is a florist. He admitted that the claim was unpaid, and, with his answer, filed a counterclaim for loss of profits on plants, and for expenses, caused by the alleged failure of the plaintiff to perform its contract to furnish heaters adequate to heat the defendant's greenhouses. The jury rendered a verdict for the defendant, and the plaintiff appealed from the consequent judgment. * * *

The evidence tended to show that what * * * occurred was this: * * * The plaintiff, at the request of the defendant, sent its salesman to the defendant's place for a consultation as to the number and sizes of heaters required for the defendant's purposes. The salesman went there, examined the premises, took measurements, and told the defendant (who disclaimed any knowledge of the number and sizes required) that a No. 11 and a No. 12 would supply the heat required, and agreed to furnish them. Now the question whether or not a statement or affirmation accompanying a sale is a warranty depends upon whether the conditions were such that the vendee had a right to understand, and did understand, that what was said by the vendor was meant as a warranty. A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not. * * * Tested by that rule, it was open to the jury to find (as they did) that the plaintiff warranted the heaters to do the work the defendant required. * * *

In the present case the evidence tends to show that after the heaters furnished had failed to do the work, the facts and circumstances were brought to the attention of the manager of the plaintiff. * * * He acknowledged that the trouble was due to the mistake of their agent, offered to pay the expense of a temporary makeshift, proceeded to install adequate heaters, and all without any repudiation of the acts of their salesman. We think, therefore, that the motion for a direction was properly denied.

But we think the learned trial judge erred in his charge respecting the measure of damages. It was a part of the defendant's business to force plants into bloom to make them ready for the winter and early spring markets, and for that purpose he required heat in his greenhouse of a certain temperature. It was open to the jury to find that the plaintiff knew this, and contracted to furnish heaters for that purpose, and failed in the performance of that contract. The trial judge directed the jury to consider the retail price of the flowers, what it would cost to replace them, and all the surrounding circumstances. But we think that was an inaccurate and misleading statement of the measure of damages in a case of the retardation in the development of plants for a particular market. The true measure of damage was the difference between the market value of such plants in the winter and early spring markets and their market value when they were in fact matured. * * *

The judgment will be reversed and a venire de novo awarded. * * *

3. The Reliance by the Buyer

MEICKLEY v. PARSONS et al.

Supreme Court of Iowa, 1885. 66 Iowa, 63, 23 N. W. 265, 55 Am. Rep. 261.

Adams, J. There was evidence tending to show that the plaintiff expressly warranted the brick "to be good brick and all right;" that they in fact were not all good; that there were in the kiln between 45,000 and 50,000 brick, and that about 10,000 were worthless; that the purchaser saw the exterior of the kiln, and that the brick upon the outside appeared to be good, but upon the removal of a portion of them there was revealed what the witnesses call a "cold spot," where the brick had been imperfectly burned; that the "cold spot," or defective part of the kiln, could have been discovered by the purchaser, but not without going upon the top of the kiln, and the kiln was covered with three thicknesses of boards, and some brick and other things, and the purchaser did not go upon the top of the kiln. The court instructed the jury that "if, by the exercise of ordinary care at the time of the purchase, he (the purchaser) might have discovered and known the character, quality, and number of brick in the kiln, and failed to do so, he cannot recover because of a breach of warranty." The giving of this instruction is assigned as error. In our opinion the instruction cannot be sustained.

In Benj. Sales, § 616, the author says: "A general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer." Some of the authorities speak of the defects which are not covered by a warranty as those which are patent or obvious. The doctrine seems to be that the warranty as to such defects is waived. The court may presume, ordinarily, that that was the understanding. But we cannot think that the purchaser who has bought with a warranty is to be careful in order to avoid a waiver of it. The purpose of exacting a warranty may be to exempt the purchaser from the necessity of diligence. The court below was perhaps misled by a rule which applies in a different kind of a case. Where the question is as to whether a representation was understood to be a warranty or a mere expression of opinion, it may be important to inquire whether the purchaser could, in the exercise of ordinary diligence, have formed his own opinion. Where a purchaser forms his own opinion, or might be expected to do so, it is the right of the seller to insist that his representation was a mere expression of opinion. But the case before us is not one of representation, where the words used might or might not be a warranty, according to circumstances. The instruction concedes the fact of warranty. Now, the brick being warranted, the purchaser, we think, might feel excused from exercising the care to discover the defect in the kiln which he, or a prudent purchaser, would probably have exercised if buying without a warranty. * * *

Reversed.

McCORMICK et al. v. KELLY.

Supreme Court of Minnesota, 1881. 28 Minn. 135, 9 N. W. 675.

DICKINSON, J. This action was brought to recover the amount of a promissory note made by the defendant to the plaintiffs for part of the purchase price of a harvester purchased by the former from the latter. The making of the note is not in issue; the only defense asserted being in the nature of a counter claim for damages from an alleged breach of warranty, on the part of plaintiffs, in respect to the harvester.

By his answer the defendant avers that he first took the machine on trial, and upon the trial it proved to be unsatisfactory and would not do good work, and that he notified the plaintiffs to take the machine away; whereupon the plaintiffs promised and agreed with the defendant to put the machine in good order and to furnish certain parts of the machine new, and warranted the machine to be well made, of good material, durable, and not liable to break or get out of order; that it would cut and elevate grain as well as any other machine, and was in all respects a first-class machine, and capable of doing first-class and satisfactory work as a harvesting machine; relying upon which promises, agreements, and warranties, defendant purchased the machine, giving the note in question. * * *

The court further instructed the jury in the following language: "A vendor may warrant against a defect that is patent and obvious. * * * You sell me a horse, and you warrant that horse to have four legs, and he has only three. I will take your word for it." The court then read in the hearing of the jury the following from Addison on Contracts: "When a general warranty is given on a sale, defects which were apparent at the time of the making of the bargain, and were known to the purchaser, cannot be relied on as a ground of action. If one sells purple to another, and saith to him, 'This is scarlet,' the warranty is to no purpose, for that the other may perceive this; and this gives no cause of action to him. To warrant a thing that may be perceived at sight is not good." The court then said to the jury: "Gentlemen, that is not the law of this state."

The court erred in these instructions to the jury. It has always been held that a general warranty should not be considered as applying to or giving a cause of action for defects known to the parties at the time of making the warranty, and both the weight of authority and reason authorize this proposition, viz., that for representations in the terms or form of a warranty of personal property no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain. * * *

In the nature of things one cannot rely upon the truth of that which he knows to be untrue; and to a purchaser fully knowing the facts in respect to the property, misrepresentation cannot have been an inducement or consideration to the making of the purchase, and hence could have been no part of the contract.

It has often been said that a general warranty may cover patent defects, and it has led to some misapprehension of the law. The proposition is strictly true, but * * * It is "confined to those cases of doubt and difficulty where the purchaser relies on his warranty and not on his own judgment." It has no application to the case of a purchaser who knows the defects in the property and the untruthfulness of the vendor's representations. We do not, however, mean to say there may not be a warranty against the future consequences or results from even known defects. * * *

Order reversed, and a new trial awarded.

SECTION 2.—DOCTRINE OF CAVEAT EMPTOR

(1) The General Rule

BARNARD v. KELLOGG.

Supreme Court of the United States, 1870. 10 Wall. 383, 19 L. Ed. 987.[1]

Davis, J. * * * No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in the sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity and the seller is guilty of no fraud and is neither the manufacturer nor grower of the article he sells, the maxim of caveat emptor [let the buyer beware] applies. Such a rule, requiring the buyer to take care of his own interests, has been found best adapted to the wants of trade. * * * And there is no hardship in it, because if the purchaser distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect and declines to do it, he takes upon himself the risk that the article is merchantable. And he cannot relieve himself and charge the seller on the ground that the examination will occupy time and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample is because there is no opportunity for * * * examination of the bulk of the commodity which the sample is shown to represent. * * *

[1] Statement of facts is omitted.

(2) Exceptions to the Doctrine

The exceptions to the rule are as follows:

(1) The seller impliedly warrants his title to the goods sold, and this warranty holds good notwithstanding the doctrine of caveat emptor.

(2) There is an implied warranty that goods purchased from a manufacturer shall be free from any secret defects, arising from the process of manufacture, that would render those goods unfit for the usual purpose to which they are put. This implied warranty has effect, notwithstanding the rule of caveat emptor. It may be added that, as to any sale of unascertained goods, the doctrine of let the buyer beware can have no application, for in such case there is no opportunity for the buyer to inspect the goods sold.

(3) Notwithstanding the rule of caveat emptor, as to articles of food purchased from a dealer for human consumption, there is an implied warranty that they shall be wholesome and fit for use.

SECTION 3.—IMPLIED WARRANTIES

1. The Implied Warranty of Title

Where a person in possession of any chattel or article of personal property undertakes to sell the same to another, as a term of the contract of sale he impliedly warrants to the buyer, by the very act of sale, that he is the owner of the property, absolute and free from liens or incumbrances of others. By this implied warranty, the innocent buyer of stolen property, reclaimed by its true owner, may always have a remedy against the person who sold to him. Thus it always behooves a buyer, where any doubt exists as to the true ownership of the article to be purchased, to satisfy himself of the responsibility of the seller.

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2. Implied Warranty of Identity in Sales by Description

Uniform Sales Act, § 14.—Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description.

DIEBOLD SAFE & LOCK CO. v. HUSTON et al.

Supreme Court of Kansas, 1895. 55 Kan. 104, 39 P. 1035, 28 L. R. A. 53.

Action by Huston & Breeding against the Diebold Safe & Lock Company. Plaintiffs had judgment, and defendant brings error.

ALLEN, J. The plaintiff * * * testified to an oral warranty by the agent of the defendant that the safe was fireproof. * * * It is clear that the safe was delivered to the plaintiffs in compliance with the terms of the written order. Does this order contain what in law amounts to a warranty? There are no words in it of express warranty. Does an order, however, for a fireproof safe, imply a warranty? * * *

There is nothing in this case indicating that the safe purchased by the plaintiffs was manufactured specially for them, but the fair inference is that it was one of a kind of safes which the defendant manufactured for sale to whomsoever would buy it. It is designated in the order as a "No. 4 fireproof safe," and the order provides that it shall be one of the defendant's latest styles and improvements, thus clearly indicating that it is one of a kind of safes manufactured by the safe and lock company. "There is in America an implied warranty of identity, namely, that the article shall be of the kind or species it purports to be or is described to be—that is, that the article delivered shall be the same thing contracted for." Benj. Sales (6th Ed.) 636.

This proposition is illustrated in the following cases: In Henshaw v. Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367, a sale and bill of parcels of two cases of indigo was made. It was shown that the article paid for and delivered was not indigo at all, but composed of Prussian blue, chromate of iron, and potash, and worthless for any purpose. It was held that the description of the article inserted in the bill of parcels amounted to a warranty that the article was such as represented. In Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595, it was held that the sale of an article as blue vitriol amounted to a warranty that it was such. In Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438, it was held that a sale of seed which the seller said was early strap-leaf, red-top turnip seed was equivalent to a warranty that it was such, and that the purchaser might recover the difference between the market value of the crop raised and the same crop from such seed as was ordered. In White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13, it was held that, on a sale of "large Bristol cabbage seed" to a market gardener, there was an implied warranty that the seed was not only raised from such stock, but free from any latent defect arising from the mode of cultivation, and would produce that kind of cabbage. In Jones v. George, 61 Tex. 345, 48 Am. Rep. 280, it was held that a sale by a druggist to a planter of an article as Paris green implied a warranty that it was that substance.

There is no doubt, under the authorities, that the article sold must answer in kind to the description under which it is sold, and that there is an implied warranty that the article delivered is such an article as the name under which it is sold indicates. When, however, the ques-

tion arises whether an article is of a particular quality or degree of excellence, unless it is designated by some term which is descriptive of the article and calls for a particular quality, the general rule is that no warranty of quality will be implied. In Wolcott v. Mount, supra, it was said: "In general, the only contract which arises on the sale of an article by a description, by its known designation in the market is that it is of the kind specified." In Winsor v. Lombard, 18 Pick. (Mass.) 57, it was held that, where a large number of barrels of mackerel branded under the inspection laws as No. 1 and No. 2 mackerel were sold in the spring with that description of them in the bill of parcels, it was not a warranty that the mackerel were free from rust, although it appeared that mackerel affected by rust are not considered as No. 1 and No. 2. In Gossler v. Refinery, 103 Mass. 331, it was held that "one who agreed to sell 'Manilla sugar' to refiners, and delivered to them what is usually called in commerce by that name, can, in the absence of fraud, misrepresentation, or warranty, recover the agreed price, though the article delivered contained more impurities than sugar known under that name usually does."

The case of Shisler v. Baxter, 109 Pa. 443, 58 Am. Rep. 738, seems to be opposed to White v. Miller, supra, holding that the sale of seed as Wakefield cabbage seed did not amount to a warranty that it was such, but was a representation as to quality. In Towell v. Gatewood, 2 Scam. (Ill.) 22, 33 Am. Dec. 437, a bill of sale of good first and second rate tobacco was made. The court refused to treat this as a warranty, but rather as an expression of opinion as to the quality of the article sold, concerning which the buyer should have relied on his own judgment or obtained an express warranty. "The mere description of iron sold as mill iron in a bill rendered to the purchaser will not amount to a warranty that the same is of the quality or grade described, but will be regarded as a mere statement of opinion or expression as to the quality." Iron Works v. Moore, 78 Ill. 65. See, also, Ryan v. Ulmer, 108 Pa. 332, 56 Am. Rep. 210; Dounce v. Dow, 64 N. Y. 411. In Fraley v. Bispham, 10 Pa. 320, 51 Am. Rep. 486, it was held that a sale bill of superior sweet-scented Kentucky leaf tobacco affords no evidence from which the jury may infer a warranty that it is either superior or sweet scented. The case of Shaw v. Smith, 45 Kan. 334, 25 P. 886, was on a contract for the sale of flaxseed, which the buyer agreed to sow, and sell the crop to the seller on certain terms stated in the contract. The seed proved worthless, and did not grow. It was held that under the contract, and in view of the purposes for which it was purchased, the buyer might recover as upon a warranty. In that case the purposes of the contract did not end with the delivery of the seed to the buyer, for he was obligated to sow the seed, and to sell the crop which it might produce to the vendor. Under such a contract, it was held that a warranty of the fitness of the seed for the purposes specified in the contract would be implied.

In the case under consideration the plaintiffs ordered a fireproof safe. There is no proof, nor was it in fact claimed at the trial, that the article delivered did not answer the description; that is, that it was not

such an article as is generally known and designated as a "fireproof safe." The evidence shows that it was manufactured and placed on the market in the same way that other fireproof safes were made. "Fireproof" is defined by Webster, "Proof against fire; incombustible." The case of Hickey v. Morrell, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824, was an action against a warehouse man to recover for goods destroyed by fire in a warehouse represented to have a fireproof exterior. It appeared that the window frames and sash were wooden, and that there were no outside shutters, and it was held that the building could not be deemed fireproof. In the course of the opinion it is said: "Here the allegation is that the exterior of the building is fireproof. It necessarily refers to the quality of the material out of which it is constructed, or which forms its exposed surface. To say of any article it is fireproof conveys no other idea than that the material out of which it is formed is incombustible." In the case of Insurance Co. v. Hird, 4 Tex. Civ. App. 82, 23 S. W. 393, in an action on a fire insurance policy which stipulated "that the assured would keep his books in a fireproof safe, and that in case of loss he would produce the books, and on failure to so produce them the policy would become void. The books were in good faith kept in a safe of the kind generally known and reputed as fireproof, but which failed to preserve them from destruction by fire. Held, that the insured had not warranted the safe to preserve the books, and that he complied with the condition."

It is not claimed in this case that the safe itself was constructed of combustible materials, nor that it was burned, or even greatly damaged by fire. The plaintiffs seek to recover solely for damages resulting from the burning of articles deposited in the safe. There was no contract or representation with reference to the degree of heat, or the length of time when exposed to a fire, against which the safe would afford protection. Safes denominated as "fireproof" are made of various sizes, capacities, and styles. If the outside be made of iron, while that metal is commonly regarded as incombustible, because it will not burn, it yet is not indestructible by fire. It is a matter of common knowledge that iron will melt when subjected to a sufficient degree of heat. To imply a warranty that the safe would protect its contents against any given exposure to fire, we think, would be to imply a warranty of quality, and that altogether indefinite in its terms, and imposing a liability which might be immensely disproportionate to the sum received. The recovery in this case was for more than three times the price of the safe. We are of the opinion that it was incumbent on the plaintiffs to inspect the safe, when they received it, for the purpose of ascertaining whether it was of the kind specified in the order; that, if it was so, no warranty of quality was implied, and no recovery can be had for the destruction of its contents.

The judgment is reversed.

3. Implied Warranty in Sale by Sample

GASCOIGNE et al. v. CARY BRICK CO.

Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 302, 104 N. E. 734, Ann. Cas. 1917C, 336.[2]

[Action by Joseph Gascoigne and another against the Cary Brick Company. There was a verdict for plaintiffs, and both parties bring exceptions.]

Braley, J. It is unquestioned that delivery was free on board at the place where the bricks were to be used, and that the wall, after its erection, because of the variation in color, proved unacceptable to the supervising architect, and the plaintiffs under their contract with the owner were obliged to demolish and rebuild it. The defendant, although promptly notified of the imperfections upon discovery, contends that the sale was for a quality of bricks known to the trade as "up and down hard brick," wherein uniformity of color is not contemplated, and asked the presiding judge in the first, second, third and sixth requests to rule that, as there was no express or implied affirmation of quality, and the defendant was not charged with fraud, the plaintiffs must be presumed to have bought on their own judgment. * * *

But these requests could not be given. The contract was not confined to the correspondence. The letters as the jury properly could find were merely preliminary to the interview between the plaintiffs and the defendant's representative, when the terms of sale were settled, and the order for the bricks given. It is in the evidence of what then took place that the contract must be sought. The testimony is irreconcilable, and the jury were to determine whom they would believe. If they accepted the plaintiffs' statements, the defendant's agent having been informed that, as both sides of the wall would have to be faced, the facings necessarily would have to be of a uniform shade or appearance, similar to the brick exhibited which the architect had accepted as of the required color, replied that he knew what the requirements were, and that the defendant would furnish the bricks accordingly. The order thereupon given and accepted the jury could say constituted a sale, where the plaintiffs relied on the statements of the seller, and the defendant impliedly warranted that the bricks delivered in bulk should correspond with the sample. * * * St. 1908, c. 237, § 16. If these terms were found to constitute the contract, the evidence was plenary that the shipments did not conform to the sample in quality; the plaintiffs therefore could recover damages, and the fourth and fifth requests were inappropriate. * * *

The plaintiffs, although they prevailed, are dissatisfied with the rulings as to the measure of damages. By the acceptance of title the plaintiffs did not as matter of law release the defendant, or bar their claim for damages. St. 1908, c. 237, § 49. It was a question of fact whether

[2] Statement of facts is omitted.

they waived the warranty and took the bricks as they found them on the cars, a negative answer to which has been established in their favor by the verdict. * * * But if they knew or ought to have known of the defective coloring, no damages caused by the use of the bricks can be recovered. * * * The jury were to determine whether by reason of moisture caused by the weather the bricks at the time of delivery, and when placed in the wall had taken on and retained a darker appearance, rendering it difficult to ascertain their true or natural color, and if this appeared, whether the plaintiffs, who might rely on the presumption that the defendant would perform its contract, had acted with reasonable diligence in using the bricks without further inspection, or whether the general appearance was such that imperfections would not have been disclosed by an extended examination. A conclusion that no negligence had been shown, in connection with the uncontradicted evidence, that notice was promptly given to the defendant who declined further performance, would warrant the assessment of damages for not only the difference between what the plaintiffs bought, and what they received, but also the expense of taking down and rebuilding the wall. * * *

The judge whose attention had been directed to the rule to be applied by the plaintiffs' request, and in his rulings upon the exclusion of evidence should have so instructed the jury. * * * But instead he charged that the plaintiffs could recover only a sum equal to the difference between the value of bricks the color of the sample, and the value of the bricks actually delivered. * * * A majority of the court are accordingly of opinion that the defendant's exceptions should be overruled, but the plaintiffs' exceptions must be sustained. * * *

HANSON et al. v. BUSSE.

Supreme Court of Illinois, 1867. 45 Ill. 496.

LAWRENCE, J. * * * The rule [of caveat emptor] must be considered firmly settled in the common law, that the vendor of goods which the purchaser has at the time of purchase, the opportunity of examining, is not responsible for defects of quality, in the absence of fraud and warranty. * * *

In the case before us the proof shows that the 110 barrels [of apples] were piled up in tiers at a railway depot in Chicago. The purchaser went with the clerk of the plaintiffs to look at them. They opened a couple of barrels that stood on the floor. The purchaser was lame from rheumatism and requested the clerk to climb up and open a barrel on the top of the tiers. He did so, and showed the [defendant] some apples which were in good condition, and said they were all like that. * * * The apples in the three barrels exhibited as samples were unquestionably merchantable, or the defendant would not have bought. It would be unreasonable to require that he should have opened every

one of the 110 barrels. He had the right to rely on the samples shown to him, and on the representations of the plaintiffs that the apples were good. * * *

[Judgment for defendant.]

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4. Implied Warranty of Fitness for a Particular Purpose

Uniform Sales Act, § 15.—Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

Sec. 15 (4).—The case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

QUEEN CITY GLASS CO. v. PITTSBURG CLAY POT CO.

Court of Appeals of Maryland, 1903. 97 Md. 429, 55 A. 447.

McSherry, C. J. This suit was brought by the Pittsburg Clay Pot Company, a body corporate, against the Queen City Glass Company, also a corporation, to recover the price of seventeen clay pots sold by the former to the latter. The declaration contains the usual money accounts. A plea denying the right of the Pittsburg Company to sue in the courts of this state, because of its failure to comply with the provisions of chapter 270 of the Acts of Assembly of 1898 was put in, which later on appears to have been demurred to; whereupon * * * amended pleas of never promised, never indebted, and payment were filed. The case then went to trial before a jury and resulted in a verdict for the plaintiff, The Pittsburg Company, upon which verdict a judgment was entered and from that judgment this appeal was taken. There is but one bill of exceptions in the case, and that brings up for review the rulings on the prayers for instructions to the jury.

The Clay Pot Company is engaged in the manufacture of clay pots for use in glass factories. The Queen City Glass Company carries on the business of making glass bottles. In the prosecution of that business, clay pots about five feet high, four feet wide, with walls four inches thick, are used to melt and hold the materials of which glass is composed. The clay pots, when shipped from the establishment where they are made, are unburnt. When needed for use by the glass factory they are placed in what is called a pot arch and subjected to an intense heat reaching two thousand degrees, and are kept there for several days. This process is called annealing. When annealed, the pots are quickly transferred from the pot arch to the glass furnace,

where they are filled with the materials out of which glass is made, and those materials are brought by the heat to a molten state, so that the glass blowers may fashion and shape the glass into bottles. In the process of annealing, some eight or nine of the seventeen pots, for the price of which this suit was brought, cracked, broke, warped, bulged, or melted down and flattened out in the pot arch and thus were rendered useless; whilst four or five of them, which had stood the annealing, cracked and broke in the glass furnace after two or three fillings, and the remainder lasted a much shorter time than such pots should be serviceable. It was shown in evidence that when the pots broke in the glass furnace, the molten glass which they contained was spilled and wasted, causing a loss of two hundred dollars, and the molten material ran down into the eye of the furnace, cut the gratebars and damaged the furnace to such an extent as to necessitate the expenditure of one hundred and fifty dollars for repairs. It was further shown that the employees of the Glass Company were skillful and competent and they had used care in annealing the pots. It was proved that the pots were made of clay brought from Germany, Missouri, Kentucky, Pennsylvania, and other places and that other ingredients were used in mixing the clay according to a secret formula known to the Pittsburg Company. In the nature of the case therefore it was impossible for the purchaser to discover any defects in the pots before they were placed in the annealing furnace, because no inspection could reveal any imperfections in their make-up or in the composition of the material of which they were constructed. The evidence further showed that inasmuch as nothing could be discovered by inspection, about the quality of the pots or as to their fitness for the use for which they were intended, the Glass Company was compelled to trust to and rely upon the manufacture and the manufacturer for their quality and fitness; and that the Pittsburg Company knew exactly to what use the Glass Company intended to apply them and what treatment in heating them would be necessary to put them in condition for use in the glass furnace. * * *

The prayer granted at the instance of the plaintiff, the appellee in this court, proceeded upon the theory that if there was an express or implied warranty on the part of the vendor it was a warranty that the "pots were reasonably fit for the purpose of being heated in" the "retort or annealing furnace to be prepared for use in the melting of glass." * * * [An implied warranty arises out of the circumstance of this case.] This court adopted and approved the proposition laid down in Jones v. Just, L. R. 3 Q. B. 197, as follows: "Where a manufacturer contracts to supply an article which he manufactures to be applied to a a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term or warranty, that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own." * * *

We think it is quite clear that the proposition just quoted is applicable. The evidence already referred to, if credited by the jury, demonstrates that the purchaser was compelled to rely on the skill and judgment of the

manufacturer. * * * The clays were mixed according to a secret formula and they were made into form and shape by hand, the process involving the addition of successive layers of the material. * * * Actual use of the pots was the sole method by which a defect could be discovered. They were manufactured for a special purpose which was known to the vendor, and the vendee was bound to trust to the manufacturer and to rely on his judgment. There could not well be a condition of circumstances more obviously within the doctrine of implied warranty. * * *

Judgment reversed, with costs above and below, and new trial awarded.

COMMERCIAL REALTY & CONSTRUCTION CO. v. DORSEY.

Court of Appeals of Maryland, 1910. 114 Md. 172, 78 A. 1099.

Action by William C. Dorsey against the Commercial Realty & Construction Company. From a judgment for plaintiff, defendant appeals.

SCHMUCKER, J. The appeal in this case was taken from a judgment of the superior court of Baltimore city against the appellant company in a suit on a contract for the supply of building materials.

The company, on the eve of the erection of a row of small buildings in Baltimore city, entered into a written contract with the appellee, William C. Dorsey, on December 9, 1908, to supply it with the requisite quantity of certain kinds of lumber and millwork, at specified prices, for the buildings. The negotiations were made, and the contract was signed on behalf of the company of Abel Rosenthal, its president, and its corporate seal was affixed thereto. It was also signed, but not sealed, by Dorsey. * * *

There is evidence in the record on behalf of the plaintiff tending to show that Rosenthal, when he looked at the lumber in Dorsey's yard, for the purpose of purchasing material to be used in the erection of the houses, informed Dorsey that the company wanted cheap lumber, and that he was then shown by Dorsey the identical lumber which was afterwards delivered under the contract, and that he agreed to buy it, and that the contract prices for it were made low because of its low quality. * * *

The fourth paragraph denied the defendant's right to recoup either the item of $75 of alleged loss from the defective quality of certain joists supplied by the plaintiff. * * * The law upon this subject received consideration by us in Queen City Glass Co. v. Clay Pot Co., 97 Md. 429, 55 A. 447, where we, quoting with approval from the cases of Jones v. Just, L. R. 3 Q. B. 197, and Rice v. Forsyth, 41 Md. 403, and relying upon other cases there cited, said: "Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to

be applied. In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own."

We have held with equal clearness that, where the seller is not the manufacturer of the article sold and the buyer has an opportunity of examining it, there is no implied warranty, in the absence of fraud, that it shall be fit for the purpose for which it was bought. In such cases, if there be no express warranty, the doctrine of caveat emptor applies, and the buyer, not having seen fit to exact a warranty, takes upon himself the risk as to quality. Horner v. Parkhurst, 71 Md. 116, 17 A. 1027. * * *

In the case now before us it is not contended that the contract sued on contained any express warranty, and, as the joists, alleged to have been defective, were merely commercial lumber, and not goods manufactured by the seller, and the buyer had ample opportunity to inspect them after they were delivered before using them, there was no implied warranty, but he must be regarded as having assumed the risk of their quality. * * *

For the reasons mentioned by us, we will affirm the judgment appealed from. * * *

GRAND AVENUE HOTEL CO. v. WHARTON et al.

Circuit Court of Appeals of the United States, Eighth Circuit, 1897. 79 F. 43.

[This was an action for the purchase price of certain boilers, sold to the defendant hotel corporation by the plaintiff. Defendant sets up breach of implied warranty, by way of recoupment or set-off to plaintiff's claim. It appeared from the evidence that defendant ordered two "Harrison safety boilers" of 150 horsepower each from the plaintiff. The order contained specifications of material and construction. The boilers were shipped and installed. It was found that the boilers were not available to use with the water from the Missouri river on account of the sediment therein. It was contended by the defendant that, since plaintiff knew for what particular purpose the boilers were to be used, and knew that they were to be supplied with Missouri river water, there was a warranty that the boilers would be fit for the purpose.]

LOCHREN, District Judge. Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular use of which he is advised, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the use to which it is to be applied. * * *

But when a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular use, yet if the known, described, and definite thing be actually applied, there is no implied warranty that it shall answer the particular purpose intended by the buyer. * * *

[In the case before us] the purchaser contracted for a definite, well-known kind of boiler. * * * The specifications as to the size, form,

material, and every detail were minute, and embodied in the contract. The manufacturers were obligated to deliver exactly such boilers as were described and contracted for, and could not, under the contract, deliver anything different. There is no claim that the boilers did not in every respect conform to this contract and specifications, nor any claim that they were defective, either in respect to workmanship or material. The purchaser did not exact a warranty that the boilers would operate with the muddy waters of the Missouri river, and therefore assumed that risk itself. * * * There were no errors in the rulings of the court, and the judgment is affirmed.

SECTION 4.—THE WARRANTIES EXTEND ONLY TO THE IMMEDIATE PURCHASER

REYNOLDS et al. v. GENERAL ELECTRIC CO. GENERAL ELECTRIC CO. v. REYNOLDS et al. REVENUE TUNNEL MINES CO. v. GENERAL ELECTRIC CO. GENERAL ELECTRIC CO. v. REVENUE TUNNEL MINES CO.

Circuit Court of Appeals of the United States, Eighth Circuit, 1905. 141 F. 551.

[This was an action for the purchase price of certain pumps sold by the General Electric Company, plaintiff, to the defendant. The defendant pleaded breach of warranty arising from a latent defect in the material of which the pumps were constructed. It is not denied that defendant at the time the pumps were purchased had knowledge of the fact that the General Electric Company was a mere dealer in the pumps.]

SANBORN, Circuit Judge. * * * It is said that an implied warranty arose from the sale, to the effect that the pump should be fit and proper for the pumping of water in the shaft of a mine, and that this covenant was broken. If the pump was unfit to do the work which machines of that nature ordinarily perform, that condition arose from latent defects in the material of which it was constructed, or in the workmanship bestowed upon it, of which the plaintiff had no notice. The electric company secured and delivered the article of the known manufacture which the mines company had selected, and which was described in the contract. A manufacturer is charged by the law with notice of latent defects in the design, materials, and construction of the machines he makes which unfit them to perform the ordinary work of such articles, because he furnishes the design, the materials, and the workmanship, and thus either causes or permits the defects. Out of this state of facts and an agreement of sale on implied warranty arises on the part of the manufacturer that the machines he makes are suitable for the general purposes for which such articles are commonly used. Goulds v. Brophy, 42 Minn. 109, 112, 43 N. W. 834, 6 L. R. A. 392. But where such a purchaser buys of a dealer a definite machine of known manufacture,

which has been, or is to be, made by a builder who is not the vendor, and the vendee knows this fact, there is no implied warranty by the dealer, either against latent defects or that the machine or article will be suitable for the purposes for which such articles are commonly used, because the purchaser has the same knowledge and means of knowledge of these subjects as has the dealer. The vendee knows that they both rely on the character and reputation of the manufacturer. * * *

[Judgment for plaintiff.]

HOYT v. HAINSWORTH MOTOR CO.

Supreme Court of Washington, 1920. 112 Wash. 440, 192 P. 918.

MAIN, J. This is an action for damages for breach of an alleged implied warranty in the sale of an automobile. The case was tried to the court and a jury, and resulted in a verdict for the plaintiff. * * * The defendant appeals. * * *

The appellant is * * * engaged in the business of selling automobiles at Seattle, Wash. On April 5 * * * it sold to the respondent a new 1918 model, six-cylinder Oldsmobile. At the time the car was sold the appellant had on the floor of its showroom this particular car. It did not, however, sell this car, but sold a car of the model described. The respondent saw and looked at the car that was in the showroom. A few days after the respondent had agreed to purchase a car, the appellant delivered to him the car which he looked at in the showroom, and then told him that it was the same car. The respondent operated the car after it was delivered to him for a period of approximately 11 months. The car was defective, in that the pistons were a little too small for the cylinders. The car did not prove to be satisfactory, and after having operated it for the time mentioned the present action was instituted, for the purpose of recovering damages for a breach of implied warranty. It should be noted and kept in mind that the appellant was not the manufacturer of the automobile, but simply a dealer. The theory of the respondent that the sale was not of a particular car, but of a particular model will be adopted.

The appellant claims that, since it was a dealer, and not a manufacturer, in selling the car there was no implied warranty against latent defects. The respondent claims that, since he purchased, not a specific car, but a car of a particular model, even though the appellant were a dealer, there would be an implied warranty against latent defects, such as ordinary inspection would not disclose. The defect in this car was latent, and one that ordinary inspection would not disclose. The controlling question is whether, under the facts stated, the appellant as dealer is liable upon an implied warranty, there being no express warranty. Upon the question as to whether the dealer is liable upon an implied warranty for a latent defect in an article sold, the decisions of the various courts that have passed upon the question are divided. In some it is held that there is such an implied warranty. The majority of the courts, however, in this

country hold that in the case of the dealer, as distinguished from the manufacturer, there is no such implied warranty. Williston on Sales, § 233. This court, in Hurley-Mason Co. v. Stebbins, Walker & Spinning, 79 Wash. 366, 140 P. 381, L. R. A. 1915B, 1131, Ann. Cas. 1916A, 948, has adopted the majority rule; that is, that a dealer does not impliedly warrant against defects not discoverable by ordinary inspection and tests. * * *

Under the undisputed facts in the present case, there was a sale of an automobile of known manufacture. There is a rule collateral to that above referred to as the majority rule, to the effect that where an article of known manufacture is made by one not the vendor, and the vendee knows this fact, there is no implied warranty by the dealer against latent defects. * * *

There is no escaping the conclusion that the appellant in this case sold to the respondent an article of known manufacture, of which the vendor or dealer was not the builder. The case comes squarely within this rule. The appellant relies upon the rule that, where goods of some specific kind are ordered of the manufacturer or dealer, which the buyer has neither inspected nor selected, there is an implied warranty that the article delivered shall be of fair average quality or goodness according to its kind, and free from remarkable defects. Mechem on Sales, § 1340. But under this rule, as pointed out by the same author in § 1345, before a dealer can be held liable on an implied warranty, the conditions stated in the rule must be present, "* * * namely, an executory agreement by the dealer to supply an article not yet ascertained, but left to be determined by him according to his own judgment, in view of the purpose to be subserved by it as communicated to him by the buyer."

This case, however, does not come within this rule. Nothing was left to be determined according to the judgment of the appellant, and his duty was fulfilled when he delivered a car of the particular model contracted for. * * *

[Judgment for defendant.]

APPENDIX

FORMS OF BUILDING CONTRACTS

A construction contract falls naturally into two main subdivisions:

1. The contract proper, containing the agreement of the parties, and the general terms by which the obligation of each is conditioned; and

2. The plans and specifications, containing the detailed terms and provisions governing performance of the builder's obligation.

It is a customary and wise precaution to include a special clause in the contract proper, whereby the parties expressly agree that the plans and specifications are to be as fully a part of the contract as if thereto attached or therein repeated.

The modern practice among architects, at least in large projects, where subcontractors may be asked to bid, is formally to separate the contract into three main subdivisions, making the first page of the set of specifications consist of the general conditions, which thus become a part of the specifications, and so are agreed to by every one who offers to do work in accordance with the specifications. By this practice the contract is composed of the following parts:

1. The general conditions, attached to and forming part of the specifications;

2. The drawings and written specifications; and

3. The agreement between owner and contractor.

It is difficult to say which is the better practice; indeed, there is little to choose between, since practically the same result may be reached by either method. However, the latter practice is that adopted by the American Institute of Architects, as will be noted from a study of the standard form of construction contract adopted by that body and reprinted herein.

Among the following forms are three forms for contract between the owner and builder, the first being the standard form adopted and copyrighted by the Institute of Architects and approved by the National Association of Builders' Exchanges, the Associated General Contractors of America, the Joint Conference on Construction Contracts, the National Association of Master Plumbers, the National Association of Sheet Metal Contractors, the National Electrical Contractors Association, and the Building Trades Employers' Association of the City of New York. Forms II and III are separate types, carefully drawn with the purpose of forestalling subsequent litigation by detailed expression of the intent of the parties. It will be of value to compare the

three forms, with a view of discovering important clauses contained in one and omitted in another, and perhaps showing how each might be improved, either by changes in addition or omission, in light of the action of the courts on these matters.

FORM I

A

THE GENERAL CONDITIONS OF THE CONTRACT FOR THE CONSTRUCTION OF BUILDINGS

Standard Form of the American Institute of Architects. These general conditions have received the approval of the National Association of Builders' Exchanges, the Associated General Contractors of America, the Joint Conference on Construction Contracts, the National Association of Master Plumbers, the National Association of Sheet Metal Contractors of the United States, the National Electrical Contractors' Association of the United States, the National Association of Marble Dealers, the Building Granite Quarries Association, and the Building Trades Employers' Association of the City of New York. Fourth edition, copyright 1915, 1918, 1925, by the American Institute of Architects, The Octagon, Washington, D. C. Copyrighted also in Canada (reprinted with permission of the American Institute of Architects. This permission applies solely to the Institute Standard Forms and in no way refers to the work as a whole).

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43. Cutting, Patching and Digging.
44. Cleaning Up.

Art. 1. Definitions.—(a) The contract documents consist of the agreement, the general conditions of the contract, the drawings and specifications, including all modifications thereof incorporated in the documents before their execution. These form the contract.

(b) The owner, the contractor and the architect are those mentioned as such in the agreement. They are treated throughout the contract documents as if each were of the singular number and masculine gender.

(c) The term "subcontractor," as employed herein, includes only those having a direct contract with the contractor and it includes one who furnishes material worked to a special design according to the plans or specifications of this work, but does not include one who merely furnishes material not so worked.

(d) Written notice shall be deemed to have been duly served if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered mail to the last business address known to him who gives the notice.

(e) The term "work" of the contractor or subcontractor includes labor or materials or both.

(f) All time limits stated in the contract documents are of the essence of the contract.

(g) The law of the place of building shall govern the construction of this contract.

Art. 2. Execution, Correlation and Intent of Documents.—The contract documents shall be signed in duplicate by the owner and the contractor. In case the owner and the contractor fail to sign the general conditions, drawings or specifications, the architect shall identify them.

The contract documents are complementary, and what is called for by any one shall be as binding as if called for by all. The intention of the documents is to include all labor and materials, equipment and transportation necessary for the proper execution of the work. It is not intended, however, that materials or work not covered by or properly inferable from any heading, branch, class or trade of the specifications shall be supplied unless distinctly so noted on the drawings. Materials or work described in words which so applied have a well known technical or trade meaning shall be held to refer to such recognized standards.

Art. 3. Detail Drawings and Instructions.—The architect shall furnish with reasonable promptness, additional instructions, by means of drawings or otherwise, necessary for the proper execution of the work. All such drawings and instructions shall be consistent with the contract documents, true developments thereof, and reasonably inferable therefrom. The work shall be executed in conformity therewith and the contractor shall do no work without proper drawings and instructions.

The contractor and the architect, if either so requests, shall jointly prepare a schedule, subject to change from time to time in accordance with the progress of the work, fixing the dates at which the various detail drawings will be required, and the architect shall furnish them in accordance with that schedule. Under like conditions, a schedule shall be prepared, fixing the dates for the submission of shop drawings, for the beginning of manufacture and installation of materials and for the completion of the various parts of the work.

Art. 4. Copies Furnished.—Unless otherwise provided in the contract documents the architect will furnish to the contractor, free of charge, all copies of drawings and specifications reasonably necessary for the execution of the work.

Art. 5. Shop Drawings.—The contractor shall submit with such promptness as to cause no delay in his own work or in that of any other contractor, two copies of all shop or setting drawings and schedules required for the work of the various trades, and the architect shall pass upon them with reasonable promptness. The contractor shall make any corrections required by the architect, file with him two corrected copies and furnish such other copies as may be needed. The architect's approval of such drawings or schedules shall not relieve the contractor from responsibility for deviations from drawings or specifications, unless he has in writing called the architect's attention to such deviations at the time of submission, nor shall it relieve him from responsibility for errors of any sort in shop drawings or schedules.

Art. 6. Drawings and Specifications on the Work.—The contractor shall keep one copy of all drawings and specifications on the work, in good order, available to the architect and to his representatives.

Art. 7. Ownership of Drawings and Models.—All drawings, specifications and copies thereof furnished by the architect are his property. They are not to be used on other work and, with the exception of the signed contract set, are to be returned to him on request, at the completion of the work. All models are the property of the owner.

Art. 8. Samples.—The contractor shall furnish for approval all samples as directed. The work shall be in accordance with approved samples.

Art. 9. Materials, Appliances, Employés.—Unless otherwise stipulated, the contractor shall provide and pay for all materials, labor, water, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work.

Unless otherwise specified, all materials shall be new and both workmanship and materials shall be of good quality. The contractor shall, if required, furnish satisfactory evidence as to the kind and quality of materials.

The contractor shall at all times enforce strict discipline and good order among his employés, and shall not employ on the work any unfit person or any one not skilled in the work assigned to him.

Art. 10. Royalties and Patents.—The contractor shall pay all royalties and license fees. He shall defend all suits or claims for infringement of any patent rights and shall save the owner harmless from loss on account thereof, except that the owner shall be responsible for all such loss when a particular process or the product of a particular manufacturer or manufacturers is specified, but if the contractor has information that the process or article specified is an infringement of a patent he shall be responsible for such loss unless he promptly gives such information to the architect or owner.

Art. 11. Surveys, Permits and Regulations.—The owner shall furnish all surveys unless otherwise specified. Permits and licenses of a temporary nature necessary for the prosecution of the work shall be secured and paid for by the contractor. Permits, licenses and easements for permanent structures or permanent changes in existing facilities shall be secured and paid for by the owner, unless otherwise specified.

The contractor shall give all notices and comply with all laws, ordinances, rules and regulations bearing on the conduct of the work as drawn and specified. If the contractor observes that the drawings and specifications are at variance therewith, he shall promptly notify the architect in writing, and any necessary changes shall be adjusted as

provided in the contract for changes in the work. If the contractor performs any work knowing it to be contrary to such laws, ordinances, rules and regulations, and without such notice to the architect, he shall bear all costs arising therefrom.

Art. 12. Protection of Work and Property.—The contractor shall continuously maintain adequate protection of all his work from damage and shall protect the owner's property from injury or loss arising in connection with this contract. He shall make good any such damage, injury or loss, except such as may be directly due to errors in the contract documents or caused by agents or employés of the owner. He shall adequately protect adjacent property as provided by law and the contract documents. He shall provide and maintain all passageways, guard fences, lights and other facilities for protection required by public authority or local conditions.

In an emergency affecting the safety of life or of the work or of adjoining property, the contractor, without special instruction or authorization from the architect or owner, is hereby permitted to act, at his discretion, to prevent such threatened loss or injury, and he shall so act, without appeal, if so instructed or authorized. Any compensation, claimed by the contractor on account of emergency work, shall be determined by agreement or arbitration.

Art. 13. Inspection of Work.—The architect and his representatives shall at all times have access to the work wherever it is in preparation or progress and the contractor shall provide proper facilities for such access and for inspection.

If the specifications, the architect's instructions, laws, ordinances or any public authority require any work to be specially tested or approved, the contractor shall give the architect timely notice of its readiness for inspection, and if the inspection is by another authority than the architect of the date fixed for such inspection. Inspections by the architect shall be promptly made, and where practicable at the source of supply. If any work should be covered up without approval or consent of the architect, it must, if required by the architect, be uncovered for examination at the contractor's expense.

Re-examination of questioned work may be ordered by the architect and if so ordered the work must be uncovered by the contractor. If such work be found in accordance with the contract documents the owner shall pay the cost of re-examination and replacement. If such work be found not in accordance with the contract documents the contractor shall pay such cost, unless he shall show that the defect in the work was caused by another contractor, and in that event the owner shall pay such cost.

Art. 14. Superintendence: Supervision.—The contractor shall keep on his work, during its progress, a competent superintendent and any necessary assistants, all satisfactory to the architect. The superintendent shall not be changed except with the consent of the architect, unless the superintendent proves to be unsatisfactory to the contractor and ceases to be in his employ. The superintendent shall represent the contractor in his absence and all directions given to him shall be as binding as if given to the contractor. Important directions shall be confirmed in writing to the contractor. Other directions shall be so confirmed on written request in each case.

The contractor shall give efficient supervision to the work using his best skill and attention. He shall carefully study and compare all drawings,

specifications and other instructions and shall at once report to the architect any error, inconsistency or omission which he may discover, but he shall not be held responsible for their existence or discovery.

Art. 15. Changes in the Work.—The owner, without invalidating the contract, may order extra work or make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

In giving instructions, the architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the owner signed or countersigned by the architect, or a written order from the architect stating that the owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered.

The value of any such extra work or change shall be determined in one or more of the following ways:

(a) By estimate and acceptance in a lump sum.

(b) By unit prices named in the contract or subsequently agreed upon.

(c) By cost and percentage or by cost and a fixed fee.

If none of the above methods is agreed upon, the contractor, provided he receives an order as above, shall proceed with the work. In such case and also under case (c), he shall keep and present in such form as the architect may direct, a correct account of the net cost of labor and materials, together with vouchers. In any case, the architect shall certify to the amount, including reasonable allowance for overhead and profit, due to the contractor. Pending final determination of value, payments on account of changes shall be made on the architect's certificate.

Art. 16. Claims for Extra Cost.—If the contractor claims that any instructions by drawings or otherwise involve extra cost under this contract, he shall give the architect written notice thereof within a reasonable time after the receipt of such instructions, and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall then be as provided for changes in the work. No such claim shall be valid unless so made.

Art. 17. Deductions for Uncorrected Work.—If the architect and owner deem it inexpedient to correct work injured or done not in accordance with the contract, an equitable deduction from the contract price shall be made therefor.

Art. 18. Delays and Extension of Time.—If the contractor be delayed at any time in the progress of the work by any act or neglect of the owner or the architect, or of any employé of either, or by any other contractor employed by the owner, or by changes ordered in the work, or by strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the contractor's control, or by delay authorized by the architect pending arbitration, or by any cause which the architect shall decide to justify the delay, then the time of completion shall be extended for such reasonable time as the architect may decide.

No such extension shall be made for delay occurring more than seven days before claim therefor is made in writing to the architect. In the case of a continuing cause of delay, only one claim is necessary.

If no schedule or agreement stating the dates upon which drawings shall be furnished is made, then no claim for delay shall be allowed on account of failure to furnish drawings until two weeks after demand for such drawings and not then unless such claim be reasonable.

This article does not exclude the recovery of damages for delay by either party under other provisions in the contract documents.

Art. 19. Correction of Work Before Final Payment.—The contractor shall promptly remove from the premises all materials condemned by the architect as failing to conform to the contract, whether incorporated in the work or not, and the contractor shall promptly replace and re-execute his own work in accordance with the contract and without expense to the owner and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement.

If the contractor does not remove such condemned work and materials within a reasonable time, fixed by written notice, the owner may remove them and may store the material at the expense of the contractor. If the contractor does not pay the expenses of such removal within ten days thereafter, the owner may, upon ten days' written notice, sell such materials at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs and expenses that should have been borne by the contractor.

Art. 20. Correction of Work After Final Payment.—Neither the final certificate nor payment nor any provision in the contract documents shall relieve the contractor of responsibility for faulty materials or workmanship and, unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of substantial completion. The owner shall give notice of observed defects with reasonable promptness. All questions arising under this article shall be decided by the architect subject to arbitration.

Art. 21. The Owner's Right to Do Work.—If the contractor should neglect to prosecute the work properly or fail to perform any provision of this contract, the owner, after three days' written notice to the contractor may, without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from the payment then or thereafter due the contractor; provided, however, that the architect shall approve both such action and the amount charged to the contractor.

Art. 22. Owner's Right to Terminate Contract.—If the contractor should be adjudged a bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, or if he should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if he should fail to make prompt payment to subcontractors or for material or labor, or persistently disregard laws, ordinances or the instructions of the architect, or otherwise be guilty of a substantial violation of any provision of the contract, then the owner, upon the certificate of the architect that sufficient cause exists to justify such action, may, without prejudice to any other right or remedy and after giving the contractor seven days' written notice, terminate the employment of the contractor and take possession of the premises and of all materials, tools and appliances thereon and finish the work by whatever method he may deem ex-

pedient. In such case the contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work including compensation for additional managerial and administrative services, such excess shall be paid to the contractor. If such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, and the damage incurred through the contractor's default, shall be certified by the architect.

Art. 23. Contractor's Right to Stop Work or Terminate Contract.—If the work should be stopped under an order of any court, or other public authority, for a period of three months, through no act or fault of the contractor or of any one employed by him, or if the architect should fail to issue any certificate for payment within seven days after it is due, or if the owner should fail to pay to the contractor within seven days of its maturity and presentation, any sum certified by the architect or awarded by arbitrators, then the contractor may, upon seven days' written notice to the owner and the architect, stop work or terminate this contract and recover from the owner payment for all work executed and any loss sustained upon any plant or materials and reasonable profit and damages.

Art. 24. Applications for Payments.—The contractor shall submit to the architect an application for each payment, and, if required, receipts or other vouchers, showing his payments for materials and labor, including payments to subcontractors as required by article 37.

If payments are made on valuation of work done, such application shall be submitted at least ten days before each payment falls due, and, if required, the contractor shall, before the first application, submit to the architect a schedule of values of the various parts of the work, including quantities, aggregating the total sum of the contract, divided so as to facilitate payments to subcontractors in accordance with article 37 (e), made out in such form as the architect and the contractor may agree upon, and, if required, supported by such evidence as to its correctness as the architect may direct. This schedule, when approved by the architect, shall be used as a basis for certificates of payment, unless it be found to be in error. In applying for payments, the contractor shall submit a statement based upon this schedule, and, if required, itemized in such form and supported by such evidence as the architect may direct, showing his right to the payment claimed.

If payments are made on account of materials delivered and suitably stored at the site but not incorporated in the work, they shall, if required by the architect, be conditional upon submission by the contractor of bills of sale or such other procedure as will establish the owner's title to such material or otherwise adequately protect the owner's interest.

Art. 25. Certificates of Payments.—If the contractor has made application as above, the architect shall, not later than the date when each payment falls due, issue to the contractor a certificate for such amount as he decides to be properly due.

No certificate issued nor payment made to the contractor, nor partial or entire use or occupancy of the work by the owner, shall be an acceptance of any work or materials not in accordance with this contract. The making and acceptance of the final payment shall constitute a waiver of all claims by the owner, other than those arising from unsettled liens, from faulty work appearing after final payment or from requirement of the

specifications, and of all claims by the contractor, except those previously made and still unsettled.

Should the owner fail to pay the sum named in any certificate of the architect or in any award by arbitration, upon demand when due, the contractor shall receive, in addition to the sum named in the certificate, interest thereon at the legal rate in force at the place of building.

Art. 26. Payments Withheld.—The architect may withhold or, on account of subsequently discovered evidence, nullify the whole or a part of any certificate to such extent as may be necessary to protect the owner from loss on account of:

(a) Defective work not remedied.

(b) Claims filed or reasonable evidence indicating probable filing of claims.

(c) Failure of the contractor to make payments properly to subcontractors or for material or labor.

(d) A reasonable doubt that the contract can be completed for the balance then unpaid.

(e) Damage to another contractor.

When the above grounds are removed payment shall be made for amounts withheld because of them.

Art. 27. Contractor's Liability Insurance.—The contractor shall maintain such insurance as will protect him from claims under workmen's compensation acts and from any other claims for damages for personal injury, including death, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or any one directly or indirectly employed by either of them. Certificates of such insurance shall be filed with the owner, if he so require, and shall be subject to his approval for adequacy of protection.

Art. 28. Owner's Liability Insurance.—The owner shall be responsible for and at his option may maintain such insurance as will protect him from his contingent liability for damages for personal injury, including death, which may arise from operations under this contract.

Art. 29. Fire Insurance.—The owner shall effect and maintain fire insurance upon the entire structure on which the work of this contract is to be done and upon all materials, in or adjacent thereto and intended for use thereon, to at least eighty per cent. of the insurable value thereof. The loss, if any, is to be made adjustable with and payable to the owner as trustee for whom it may concern.

All policies shall be open to inspection by the contractor. If the owner fails to show them on request, or if he fails to effect or maintain insurance as above, the contractor may insure his own interest and charge the cost thereof to the owner. If the contractor is damaged by failure of the owner to maintain such insurance, he may recover as stipulated in the contract for recovery of damages.

If required in writing by any party in interest, the owner as trustee shall, upon the occurrence of loss, give bond for the proper performance of his duties. He shall deposit any money received from insurance in an account separate from all his other funds and he shall distribute it in accordance with such agreement as the parties in interest may reach, or under an award of arbitrators appointed, one by the owner, another by joint action of the other parties in interest, all other procedure being as provided elsewhere in the contract for arbitration. If after loss no special agree-

ment is made, replacement of injured work shall be ordered and executed as provided for changes in the work.

The trustee shall have power to adjust and settle any loss with the insurers unless one of the contractors interested shall object in writing within three working days of the occurrence of loss, and thereupon arbitrators shall be chosen as above. The trustees shall in that case make settlement with the insurers in accordance with the directions of such arbitrators, who shall also, if distribution by arbitration is required, direct such distribution.

Art. 30. Guaranty Bonds.—The owner shall have the right, prior to the signing of the contract, to require the contractor to furnish bond covering the faithful performance of the contract and the payment of all obligations arising thereunder, in such form as the owner may prescribe and with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the contractor; if subsequent thereto, it shall be paid by the owner.

Art. 31. Damages.—If either party to this contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage.

Claims under this clause shall be made in writing to the party liable within a reasonable time of the first observance of such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration.

Art. 32. Liens.—Neither the final payment nor any part of the retained percentage shall become due until the contractor, if required, shall deliver to the owner a complete release of all liens arising out of this contract, or receipts in full in lieu thereof and, if required in either case, an affidavit that so far as he has knowledge or information the releases and receipts include all the labor and material for which a lien could be filed; but the contractor may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the owner, to indemnify him against any lien. If any lien remain unsatisfied after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging such a lien, including all costs and a reasonable attorney's fee.

Art. 33. Assignment.—Neither party to the contract shall assign the contract or sublet it as a whole without the written consent of the other, nor shall the contractor assign any moneys due or to become due to him hereunder, without the previous written consent of the owner.

Art. 34. Mutual Responsibility of Contractors.—Should the contractor cause damage to any other contractor on the work the contractor agrees, upon due notice, to settle with such contractor by agreement or arbitration, if he will so settle. If such other contractor sues the owner on account of any damage alleged to have been so sustained, the owner shall notify the contractor, who shall defend such proceedings at the owner's expense and, if any judgment against the owner arise therefrom, the contractor shall pay or satisfy it and pay all costs incurred by the owner.

Art. 35. Separate Contracts.—The owner reserves the right to let other contracts in connection with this work. The contractor shall afford other contractors reasonable opportunity for the introduction and storage

of their materials and the execution of their work, and shall properly connect and coordinate his work with theirs.

If any part of the contractor's work depends for proper execution or results upon the work of any other contractor, the contractor shall inspect and promptly report to the architect any defects in such work that render it unsuitable for such proper execution and results. His failure so to inspect and report shall constitute an acceptance of the other contractor's work as fit and proper for the reception of his work, except as to defects which may develop in the other contractor's work after the execution of his work.

To insure the proper execution of his subsequent work the contractor shall measure work already in place and shall at once report to the architect any discrepancy between the executed work and the drawings.

Art. 36. Subcontracts.—The contractor shall, as soon as practicable after the signature of the contract, notify the architect in writing of the names of subcontractors proposed for the principal parts of the work and for such others as the architect may direct and shall not employ any that the architect may within a reasonable time object to as incompetent or unfit.

If the contractor has submitted before signing the contract a list of subcontractors and the change of any name on such list is required in writing by the owner after signature of agreement, the contract price shall be increased or diminished by the difference in cost occasioned by such change.

The architect shall, on request, furnish to any subcontractor, wherever practicable, evidence of the amounts certified on his account.

The contractor agrees that he is as fully responsible to the owner for the acts and omissions of his subcontractors and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.

Nothing contained in the contract documents shall create any contractual relation between any subcontractor and the owner.

Art. 37. Relations of Contractor and Subcontractor.—The contractor agrees to bind every subcontractor and every subcontractor agrees to be bound by the terms of the agreement, the general conditions, the drawings and specifications as far as applicable to his work, including the following provisions of this article, unless specifically noted to the contrary in a subcontract approved in writing as adequate by the owner or architect.

This does not apply to minor subcontracts.

The subcontractor agrees—

(a) To be bound to the contractor by the terms of the agreement, general conditions, drawings and specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner.

(b) To submit to the contractor applications for payment in such reasonable time as to enable the contractor to apply for payment under article 24 of the general conditions.

(c) To make all claims for extras, for extensions of time and for damages for delays or otherwise, to the contractor in the manner provided in the general conditions for like claims by the contractor upon the owner, except that the time for making claims for extra cost is one week.

The contractor agrees—

(d) To be bound to the subcontractor by all the obligations that the owner assumes to the contractor under the agreement, general conditions,

drawings and specifications, and by all the provisions thereof affording remedies and redress to the contractor from the owner.

(e) To pay the subcontractor, upon the issuance of certificates, if issued under the schedule of values described in article 24 of the general conditions, the amount allowed to the contractor on account of the subcontractor's work to the extent of the subcontractor's interest therein.

(f) To pay the subcontractor, upon the issuance of certificates, if issued otherwise than as in (e), so that at all times his total payments shall be as large in proportion to the value of the work done by him as the total amount certified to the contractor is to the value of the work done by him.

(g) To pay the subcontractor to such extent as may be provided by the contract documents or the subcontract, if either of these provides for earlier or larger payments than the above.

(h) To pay the subcontractor on demand for his work or materials as far as executed and fixed in place, less the retained percentage, at the time the certificate should issue, even though the architect fails to issue it for any cause not the fault of the subcontractor.

(j) To pay the subcontractor a just share of any fire insurance money received by him, the contractor, under article 29 of the general conditions.

(k) To make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract.

(l) That no claim for services rendered or materials furnished by the contractor to the subcontractor shall be valid unless written notice thereof is given by the contractor to the subcontractor during the first ten days of the calendar month following that in which the claim originated.

(m) To give the subcontractor an opportunity to be present and to submit evidence in any arbitration involving his rights.

(n) To name as arbitrator under arbitration proceedings as provided in the general conditions the person nominated by the subcontractor, if the sole cause of dispute is the work, materials, rights or responsibilities of the subcontractor; or, if of the subcontractor and any other subcontractor jointly, to name as such arbitrator the person upon whom they agree.

The contractor and the subcontractor agree that—

(o) In the matter of arbitration, their rights and obligations and all procedure shall be analogous to those set forth in this contract.

Nothing in this article shall create any obligation on the part of the owner to pay to or to see to the payment of any sums to any subcontractor.

Art. 38. Architect's Status.—The architect shall have general supervision and direction of the work. He is the agent of the owner only to the extent provided in the contract documents and when in special instances he is authorized by the owner so to act, and in such instances he shall, upon request, show the contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract.

As the architect is, in the first instance, the interpreter of the conditions of the contract and the judge of its performance, he shall side neither with the owner nor with the contractor, but shall use his powers under the contract to enforce its faithful performance by both.

In case of the termination of the employment of the architect, the owner shall appoint a capable and reputable architect, whose status under the contract shall be that of the former architect.

Art. 39. Architect's Decisions.—The architect shall, within a reasonable time, make decisions on all claims of the owner or contractor and on all other matters relating to the execution and progress of the work or the interpretation of the contract documents.

The architect's decisions, in matters relating to artistic effect, shall be final, if within the terms of the contract documents.

Except as above or as otherwise expressly provided in the contract documents, all the architect's decisions are subject to arbitration.

Art. 40. Arbitration.—All questions subject to arbitration under this contract shall be submitted to arbitration at the choice of either party to the dispute.

The contractor shall not cause a delay of the work during any arbitration proceedings, except by agreement with the owner.

The demand for arbitration shall be filed in writing with the architect, in the case of an appeal from his decision, within ten days of its receipt and in any other case within a reasonable time after cause thereof and in no case later than the time of final payment, except as otherwise expressly stipulated in the contract. If the architect fails to make a decision within a reasonable time, an appeal to arbitration may be taken as if his decision had been rendered against the party appealing.

No one shall be nominated or act as an arbitrator who is in any way financially interested in this contract or in the business affairs of either the owner, contractor or architect.

Unless otherwise provided by controlling statutes, the parties may agree upon one arbitrator; otherwise there shall be three, one named in writing, by each party to this contract, to the other party and to the architect and the third chosen by these two arbitrators, or if they fail to select a third within fifteen days, then he shall be chosen by the presiding officer of the Bar Association nearest to the location of the work. Should the party demanding arbitration fail to name an arbitrator within ten days of his demand, his right to arbitration shall lapse. Should the other party fail to choose an arbitrator within said ten days, then such presiding officer shall appoint such arbitrator. Should either party refuse or neglect to supply the arbitrators with any papers or information demanded in writing, the arbitrators are empowered by both parties to proceed ex parte.

If there be one arbitrator his decision shall be binding; if three the decision of any two shall be binding. Such decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in court to carry it into effect.

The arbitrators, if they deem that the case demands it, are authorized to award to the party whose contention is sustained such sums as they shall deem proper for the time, expense and trouble incident to the appeal and, if the appeal was taken without reasonable cause, damages for delay. The arbitrators shall fix their own compensation, unless otherwise provided by agreement, and shall assess the costs and charges of the arbitration upon either or both parties.

The award of the arbitrators shall be in writing and it shall not be open to objection on account of the form of the proceeding or the award, unless otherwise provided by the controlling statutes.

In the event of such statutes providing on any matter covered by this article otherwise than as hereinbefore specified, the method of procedure throughout and the legal effect of the award shall be wholly in accordance with the said statutes, it being intended hereby to lay down a principle

of action to be followed, leaving its local application to be adapted to the legal requirements of the jurisdiction having authority over the arbitration.

Art. 41. Cash Allowances.—The contractor shall include in the contract sum all allowances named in the contract documents and shall cause the work so covered to be done by such contractors and for such sums as the architect may direct, the contract sum being adjusted in conformity therewith. The contractor declares that the contract sum includes such sums for expenses and profit on account of cash allowances as he deems proper. No demand for expenses or profit other than those included in the contract sum shall be allowed. The contractor shall not be required to employ for any such work persons against whom he has a reasonable objection.

Art. 42. Use of Premises.—The contractor shall confine his apparatus, the storage of materials and the operations of his workmen to limits indicated by law, ordinances, permits or directions of the architect and shall not unreasonably encumber the premises with his materials.

The contractor shall not load or permit any part of the structure to be loaded with a weight that will endanger its safety.

The contractor shall enforce the architect's instructions regarding signs, advertisements, fires and smoking.

Art. 43. Cutting, Patching and Digging.—The contractor shall do all cutting, fitting or patching of his work that may be required to make its several parts come together properly and fit it to receive or be received by work of other contractors shown upon, or reasonably implied by, the drawings and specifications for the completed structure, and he shall make good after them as the architect may direct.

Any cost caused by defective or ill-timed work shall be borne by the party responsible therefor.

The contractor shall not endanger any work by cutting, digging or otherwise, and shall not cut or alter the work of any other contractor save with the consent of the architect.

Art. 44. Cleaning Up.—The contractor shall at all times keep the premises free from accumulations of waste material or rubbish caused by his employés or work, and at the completion of the work he shall remove all his rubbish from and about the building and all his tools, scaffolding and surplus materials and shall leave his work "broom clean" or its equivalent, unless more exactly specified. In case of dispute the owner may remove the rubbish and charge the cost to the several contractors as the architect shall determine to be just.

(Here follow the plans and specifications.)

B

THE STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND OWNER FOR CONSTRUCTION OF BUILDINGS

Issued by the American Institute of Architects for use when a stipulated sum forms the basis of payment. This form of agreement has received the approval of the National Association of Builders' Exchanges, the Associated General Contractors of America, the Joint Conference on Con-

struction Contracts, the National Association of Master Plumbers, the National Association of Sheet Metal Contractors of the United States, the National Electrical Contractors' Association of the United States, the National Association of Marble Dealers, the Building Granite Quarries Association, and the Building Trades Employers' Association of the City of New York. Fourth edition, copyright 1915, 1918, 1925, by the American Institute of Architects, The Octagon, Washington, D. C. Copyrighted also in Canada. This form is to be used only with the standard general conditions of the contract for construction of buildings. (Reprinted with permission of the American Institute of Architects. This permission applies solely to the Institute Standard Forms and in no way refers to the work as a whole).

This agreement, made the ——— day of ——— in the year nineteen hundred and ———, by and between ———, hereinafter called the contractor, and ———, hereinafter called the owner, witnesseth, that the contractor and the owner for the considerations hereinafter named agree as follows:

Article 1. Scope of the Work.—The contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specifications entitled (here insert the caption descriptive of the work as used on the drawings and in the other contract documents), prepared by ———, acting as and in these contract documents entitled the architect, and shall do everything required by this agreement, the general conditions of the contract, the specifications and the drawings.

Article 2. Time of Completion.—The work to be performed under this contract shall be commenced ——— and shall be substantially completed ———. (Here insert stipulation as to liquidated damages, if any.)

Article 3. The Contract Sum.—The owner shall pay the contractor for the performance of the contract, subject to additions and deductions provided therein, in current funds as follows: (State here the lump sum amount, unit prices, or both, as desired in individual cases.) Where the quantities originally contemplated are so changed that application of the agreed unit price to the quantity of work performed is shown to create a hardship to the owner or the contractor, there shall be an equitable adjustment of the contract to prevent such hardship.

Article 4. Progress Payments.—The owner shall make payments on account of the Contract as provided therein, as follows: On or about the ——— day of each month ——— per cent. of the value, based on the contract prices, of labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the ——— day of that month, as estimated by the architect, less the aggregate of previous payments; and upon substantial completion of the entire work, a sum sufficient to increase the total payments to ——— per cent. of the contract price. (Insert here any provision made for limiting or reducing the amount retained after the work reaches a certain stage of completion.)

Article 5. Acceptance and Final Payment.—Final payment shall be due ——— days after substantial completion of the work provided the work be then fully completed and the contract fully performed.

Upon receipt of written notice that the work is ready for final inspection and acceptance, the architect shall promptly make such inspection, and when he finds the work acceptable under the contract and the contract fully performed he shall promptly issue a final certificate, over his

own signature, stating that the work provided for in this contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the contractor, and noted in said final certificate, is due and payable.

Before issuance of final certificate the contractor shall submit evidence satisfactory to the architect that all payrolls, material bills, and other indebtedness connected with the work have been paid.

If, after the work has been substantially completed, full completion thereof is materially delayed through no fault of the contractor, and the architect so certifies, the owner shall, upon certificate of the architect, and without terminating the contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Article 6. The Contract Documents.—The general conditions of the contract, the specifications and the drawings, together with this agreement, form the contract, and they are as fully a part of the contract as if hereto attached or herein repeated. The following is an enumeration of the specifications and drawings: ———.

FORM II

BUILDING CONTRACT

This agreement, made this ——— day of ——— in the year one thousand nine hundred and ———, by and between ———, party of the first part (hereinafter known as the contractor—), and ———, party of the second part (hereinafter known as the owner—), witnesseth: That said contractor—, in consideration of the agreements herein made by said owner—, agree— with the said owner— as follows:

Article I. The contractor— shall and will provide all the materials and perform all the work for the ———, as shown on the drawings and described in the specifications prepared by ———, architect—, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

Art. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architect—, and that ——— decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said architect—, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in article I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said architect— are and remain ——— property, and that all charges for the use of the same, and for the services of said architect—, are to be paid by the said owner—.

Art. III. No alterations shall be made in the work except upon written order of the architect—; the amount to be paid by the owner—, or allowed by the contractor— by virtue of such alterations to be stated in said order. Should the owner— and contractor— not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in article XII of this contract.

Art. IV. The contractor— shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the architect— or his authorized representatives; shall, within twenty-four hours after receiving written notice from the architect— to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the architect— shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

Art. V. Should the contractor— at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect—, the owner— shall be at liberty, after three days written notice to the contractor—, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor— under this contract; and if the architect— shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner— shall also be at liberty to terminate the employment of the contractor— for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor— ——— shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner— in finishing the work, such excess shall be paid by the owner— to the contractor—; but if such expense shall exceed such unpaid balance, the contractor— shall pay the difference to the owner—. The expense incurred by the owner— as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect—, whose certificate thereof shall be conclusive upon the parties.

Art. VI. The contractor— shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit:———

Art. VII. Should the contractor— be delayed in the prosecution or completion of the work by the act, neglect or default of the owner—, of the architect—, or of any other contractor employed by the owner— upon the work, or by any damage caused by fire or other casualty for which the contractor— ——— not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part

of the contractor—, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the architect—; but no such allowance shall be made unless a claim therefor is presented in writing to the architect— within forty-eight hours of the occurrence of such delay.

Art. VIII. The owner— agree— to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the contractor—, agree— that ——— will reimburse the contractor— for such loss; and the contractor— agree— that if ——— shall delay the progress of the work so as to cause loss for which the owner— shall become liable, then ——— shall reimburse the owner— for such loss. Should the owner— and contractor— fail to agree as to the amount of loss comprehended in this article, the determination of the amount shall be referred to arbitration as provided in article XII of this contract.

Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner— to the contractor— for said work and materials shall be ———, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner— to the contractor—, in current funds, and only upon certificates of the architect—, as follows:

Payments: ———.

The final payment shall be made within ——— days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the owner— of the said premises might become liable, and which is chargeable to the contractor—, the owner— shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify ——— against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor— shall refund to the owner— all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor— default.

Art. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Art. XI. The owner— shall during the progress of the work maintain insurance on the same against loss or damage by fire, ———, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

Art. XII. In case the owner— and contractor— fail to agree in relation to matters of payment, allowance or loss referred to in articles III or VIII of this contract, or should either of them dissent from the decision of the architect— referred to in article VII of this contract, which dissent shall have been filed in writing with the architect— within ten days of the announcement of such decision, then the matter shall be referred to a board of arbitration to consist of one person selected by the owner—,

and one person selected by the contractor—, these two to select a third. The decision of any two of this board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference. The contractor— shall during the progress of the work maintain compensation insurance upon all employees.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

———, Witness. ———, Contractor.
———, Witness. ———, Owner.

FORM III.

This agreement, between ———, of ———, hereinafter called the owner, and ———, of ———, hereinafter called the contractor, made at ——— the ——— day of ———, 19—.

The respective parties hereto, each in consideration of the agreements of the other herein set forth, agree with each other as follows:

Contractor's Agreement.—The contractor agrees to build, erect, complete and finish on ——— land ——— according to the drawings and specifications made by ———, architect. Said plans and specifications, together with this contract, of which they are deemed to be a part, are to be construed together, so that any work shown on the plans, though not mentioned on the specifications, or vice versa, or any provision of the contract not repeated in the plans and specifications, or vice versa, is to be executed by the contractor as a part of this contract. Figured dimensions are to prevail over scale. All things which in the opinion of the architect may fairly be inferred from the plans and specifications are to be executed as part of this contract by the contractor. If complete drawings of detail have not yet been made, the same, when made and conforming to said plans and specifications, are to constitute part of this contract, the architect being the sole judge as to whether said detailed drawings conform to said plans and specifications. All the plans and drawings received by the contractor at any time during the continuance of this contract are at its termination to be returned to the architect.

All material and work, where the quantity, dimensions, and quality are not shown on the plans or specified in the specifications, are to be furnished in sufficient quantity and of sufficient dimensions for the proper execution of the work as determined by the architect, and the quality and workmanship are to be the best throughout, and satisfactory to the architect.

The contractor is to take out at his own expense all necessary permits from the municipal or other public authorities, to give all the notices required by law or municipal ordinance, and to pay all fees and charges incident to the due and lawful prosecution of the work covered by this contract.

Wherever this contract involves excavation or mason work, the contractor is to execute the same without encroaching upon adjoining public or private property, and shall procure for the owner the certificate of some competent surveyor, to be selected by the owner, that there has been no

such encroachment, in which case the contractor shall be relieved from all responsibility as to the correct location of the walls and foundations in this respect.

The contractor shall devote his time and personal superintendence to the execution of this contract, and shall employ a competent foreman or clerk of the works, who shall at all times be present while any work is being done under this contract, at the building.

The entire work and all its parts, including material, workmanship, and rate of progress, shall be satisfactory to the architect. All materials rejected by the architect, whether worked or unworked, and whether affixed to the building or not, shall be removed from the premises (and for that purpose taken down if already attached to the building) at the request of the architect; and all work condemned by the architect, as in any way unsound or as not conforming to the terms of this contract, shall be taken down forthwith and rebuilt by the contractor in accordance with the contract and in a manner satisfactory to the architect. The contractor shall dismiss any of his employees if the architect considers said employee incompetent or careless and so informs the contractor.

The contractor shall clear away all dirt and rubbish caused by his operations as often as requested by the architect or owner, and shall leave the premises at the termination of this contract free from such dirt and rubbish and in a neat and clean condition.

The contractor shall prosecute the work speedily and continuously ——— and the entire work covered by this contract shall be finished by the ——— day of ———, 19—. The damages for default are fixed at ——— dollars for every day thereafter that the said work shall remain unfinished.

The contractor shall make good all defects, omissions, and violations of the terms of this contract whensoever discovered, during the progress of the work or afterwards, notwithstanding any payments that may have been made, or any certificates that may have been given, or any possession or acceptance of the work by the owner, and shall be responsible for any damages that may be caused in making good said defects, omissions, or violations.

The contractor shall comply with all the laws, ordinances, and regulations for the time being in force in the city or town where the building is situated and relating to the building or other work included in this contract, and shall satisfy all the requirements of the inspectors (if there be such).

The contractor shall furnish all transportation, scaffolding, apparatus, ways, works, machinery, and plant requisite for the execution of this contract, and shall be solely answerable for the safe, proper, and lawful construction, maintenance and use of the same; he shall cover and protect his work from damage, and all injury to the same, before the completion of this contract, shall be made good by him, and shall be solely answerable for all damage or delay to the owner or his property, to other contractors or employees of the owner, to neighboring premises, or to any person or property, due to the improper, illegal or negligent conduct of the contractor, or of his subcontractors, employees, or agents, in or about the said building or the execution of the work covered by this contract or any extra work undertaken as hereinafter provided.

The contractor shall have sole charge and possession of the work covered by this contract until the termination thereof, but shall permit the owner and the architect and any person employed by either of them to visit, enter, and inspect the said work at all times and places during the

progress thereof, and shall provide safe and proper facilities for such inspection.

The contractor shall permit other contractors or employees of the owner to prosecute their work, and shall render them all necessary assistance.

The Owner's Agreement.—The owner agrees to pay the contractor the sum of ——— dollars according to the following schedules and subject to the conditions hereinafter set forth:

The first payment to be ——— dollars ($———).

The second payment to be ——— dollars ($———).

The third payment to be ——— dollars ($———).

The fourth payment to be ——— dollars ($———).

The fifth payment to be ——— dollars ($———).

The sixth payment to be ——— dollars ($———).

The seventh payment to be ——— dollars ($———).

And the balance ——— dollars ($———).
thirty-five days after the completion of this contract.

Total, $———.

Provided, however, that none of the foregoing payments shall be due or payable, unless the following conditions shall have been complied with:

1. Unless the work to the stage in question has been done in the manner herein agreed, and there has been no breach by the contractor of any of the provisions of this contract.

2. Unless the contractor shall deliver to the owner the written certificate of the architect that the work to the stage in question has, in his opinion, been done in the manner herein agreed.

3. Unless (if the contract include excavations or mason work on outside walls) the contractor shall deliver to the owner the written certificate of some competent surveyor to be selected by the owner that there has been no encroachment upon adjoining public or private property.

4. Unless the property is free from all liens or right of lien for debts due or claimed to be due from the contractor, and satisfactory evidence thereof furnished (if requested) to the owner.

Alterations and Extras.—The architect may in writing and from time to time order the contractor to make any changes in the work which do not increase the cost to the owner or affect the time of completion. In case said changes make the work less expensive to the contractor, a proportional deduction shall be made from the contract price above specified. In no case shall any change be made in the work which shall increase the cost of the work to the owner, or involve any extension of time, without his express and special consent; and, if the contractor shall proceed to execute such change without first obtaining such consent, he shall be concluded against making any extra charge for the said change or any claim for further time.

In case of any change ordered by the architect as aforesaid, or in case any other changes in the work are made by the mutual consent of the parties hereto, whether affecting the contract price or not, or the time of completion or not, all and singular the other provisions of this contract shall remain in force and apply to the contract as thus altered.

Orders.—If any orders are accepted by the owner (and it is understood that he shall be under no obligation to accept any), such acceptances shall be conditional on the due performance by the contractor of all and singular the provisions of this contract, and subject to alterations as aforesaid.

The Architect.—The architect mentioned in this contract is understood to be ———, of ———, or such other architect as the owner may hereafter select; any change to be notified to the contractor in writing.

The architect shall have authority to enter and inspect the work at all times, to reject all material (whether set up or not) and to condemn all work which in his opinion is not in conformity with the provisions of this contract, and to do all the things hereinbefore set forth as within his powers. Neither the architect nor any person employed by him shall have any control or direction over the progress of the work, except the power of rejecting it, nor any control or superintendence over the scaffolding, apparatus, ways, works, machinery, or plant, the sole responsibility for which shall rest with the contractor; and neither of them shall have power to order extras or alterations, except as above provided, or any authority other than that expressly set forth in this contract. The architect shall not be deemed the agent of the owner for any purpose whatsoever, except as the owner may in fact give him a special and express authority.

Miscellaneous Provisions.—No payment of money under this contract, nor any acceptance or possession taken of the work done by the contractor, nor any certificate given shall be evidence of the performance of this contract or be construed as a waiver of any of its provisions by the owner; nor shall any waiver of any breach of this contract be held to be a waiver of any other or subsequent breach.

If, in the opinion of the architect, the contractor is obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of any other contractor or by any damage which may happen thereto by fire or by the unusual action of the elements or by the abandonment of the work by the employees in a general strike, then the contractor shall be entitled to such extension of the time specified above for the completion of the work as the architect shall in writing certify: Provided, however, that claim is made by the contractor at the time and in writing.

If at any time before the completion of this contract the contractor becomes bankrupt or insolvent, or makes an assignment for the benefit of creditors, or assigns this contract or sublets any part of it without the consent of the owner first obtained in writing, or becomes incapable of completing the contract, or shall at any time for six days refuse or neglect to proceed with the contract work in the manner herein agreed to the satisfaction of the architect, then the owner may at once terminate this contract by a written notice delivered to the contractor in person or at his usual place of business, and proceed to complete the work with other mechanics or contractors, and account to the contractor or his legal representatives as follows: The owner shall be credited with all payments theretofore made by him to the contractor, with the entire cost of completing the work with said other mechanics and contractors, and with all damages by delay or otherwise caused by the default of the contractor, including reasonable expenses of counsel. If the contract price exceeds the total amount of these credits, the excess shall be paid to the contractor or his legal representatives. In case orders accepted by the owner are outstanding, the holders thereof shall be entitled to such excess in preference to the contractor or his legal representatives. If, however, the total amount of the said credits exceeds the contract price, the

excess shall be due from the contractor to the owner. In such accounting, the owner shall not be held to obtain the lowest figures for the work of completing the contract; but all sums actually paid by him for such completion shall be credited to him.

All material delivered at the building by or on account of the contractor, and intended to be incorporated with the building, shall become the property of the owner as delivered; but the contractor may repossess himself of any surplus left at the completion of the contract. All scaffolding, apparatus, ways, works, machinery, and plant brought upon the premises by the contractor, or used by him, shall remain his property; but, in case of default and a completion of the contract work by the owner, the latter shall be entitled to use the said scaffolding, apparatus, ways, works, machinery, and plant without cost or liability for depreciation or injury by use.

If the owner does not make the payments herein provided as and when the same shall become due and payable, he shall be liable to the contractor for interest on the same; and if such default continues for a period of ten days, the contractor may, by a written notice delivered to the owner in person or at his usual place of business, terminate this contract. But the acceptance of any money under this contract subsequent to such default shall operate as a waiver thereof and of the right to terminate this contract by reason thereof.

The owner shall keep the building and the material on the premises insured against fire in such companies as he shall select, for the benefit of himself or any mortgagee and of any and all contractors on the building who shall request such insurance in writing. The expense of said insurance shall be borne by the owner; but he shall not be responsible for carrying too little insurance, unless the contractor has requested him in writing to insure in a certain specified amount, and the owner has neglected to do so for an unreasonable length of time. In the event of a fire, the insurance money shall be divided between the owner and any mortgagee and those contractors for whose benefit the insurance was taken out, as their interests may appear; and the parties hereto shall respectively proceed to the completion of this contract.

All disputes arising out of this contract or the performance or breach thereof shall be settled by mutual agreement or in a court of law or equity before a single justice, auditor, or special master, and no claim shall be made for a trial by jury on the whole case or special issues.

In witness whereof, we, the said ——— and the said ———, hereto set our hands and seals this ——— day of ———, 19—.

FORM IV

THE STANDARD FORM OF BOND

Issued by the American Institute of Architects. This form has been approved by the National Association of Builders' Exchanges, the National Association of Master Plumbers, the National Association of Master Steam and Hot Water Fitters, the National Association of Sheet Metal Contractors of the United States, the National Electrical Contractors' Association of the United States, and the National Association of Marble Dealers. Second edition, copyright 1915 by the American Institute of Architects,

The Octagon, Washington, D. C. (Reprinted with permission of the American Institute of Architects. This permission applies solely to the Institute Standard Forms, and in no way refers to the work as a whole).

Know all men: That we ——— (here insert the name and address or legal title of the contractor), hereinafter called the principal, and ———, ———, ———, and ——— (here insert the name and address or legal title of one or more sureties), hereinafter called the surety or sureties are held and firmly bound unto ——— (here insert the name and address or legal title of the owner), hereinafter called the owner, in the sum of ——— ($———) for the payment whereof the principal and the surety or sureties bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly, by these presents.

Whereas, the principal has, by means of a written agreement, dated ———, entered into a contract with the owner for ———, a copy of which agreement is by reference made a part hereof:

Now, therefore, the condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect:

Provided, however, that no suit, action or proceeding by reason of any default whatever shall be brought on this bond after ——— months from the day on which the final payment under the contract falls due:

And provided, that any alterations which may be made in the terms of the contract, or in the work to be done under it, or the giving by the owner of any extension of time for the performance of the contract, or any other forbearance on the part of either the owner or the principal to the other shall not in any way release the principal and the surety or sureties, or either or any of them, their heirs, executors, administrators, successors or assigns from their liability hereunder, notice to the surety or sureties of any such alteration, extension or forbearance being hereby waived.

Signed and sealed this ——— day of ———, 19—. In presence of

———	as to	———(Seal.)
———		———
———	as to	———(Seal.)
———		———
———	as to	———(Seal.)
———		———
———	as to	———(Seal.)
———		———

FORM V

THE STANDARD FORM OF SUBCONTRACT

This form has been approved by the National Association of Builders' Exchanges, the National Association of Master Plumbers, the National Association of Marble Dealers, and the National Association of Sheet Metal Contractors of the United States. Copyright 1915 by the American Institute of Architects, The Octagon, Washington, D. C. (Reprinted with permission of the American Institute of Architects. This permission applies solely to the Institute Standard Forms and in no way refers to the work as a whole).

This agreement, made this ——— day of ———, 19—, by and between ———, hereinafter called the subcontractor, and ———, hereinafter called the contractor, witnesseth, that the subcontractor and contractor for the considerations hereinafter named agree as follows:

Section 1. The subcontractor agrees to furnish all material and perform all work as described in section 2 hereof for (here name the kind of building) for (here insert the name of the owner) hereinafter called the owner, at (here insert the location of the work) in accordance with the general conditions of the contract between the owner and the contractor, and in accordance with the drawings and the specifications prepared by ———, hereinafter called the architect, all of which general conditions, drawings and specifications signed by the parties thereto or identified by the architect, form a part of a contract between the contractor and the owner dated ———, 19—, and hereby become a part of this contract.

Section 2. The subcontractor and the contractor agree that the materials to be furnished and work to be done by the subcontractor are: (Here insert a precise description of the work, preferably by reference to the numbers of the drawings and the pages of the specifications.)

Section 3. The subcontractor agrees to complete the several portions and the whole of the work herein sublet by the time or times following: (Here insert the date or dates, and if there be liquidated damages state them.)

Section 4. The contractor agrees to pay the subcontractor for the performance of his work the sum of ——— dollars ($———) in current funds, subject to additions and deductions for changes as may be agreed upon, and to make payments on account thereof in accordance with section 5 hereof.

Section 5. The contractor and subcontractor agree to be bound by the terms of the general conditions, drawings and specifications as far as applicable to this subcontract, and also by the following provisions:

The subcontractor agrees:

(a) To be bound to the contractor by the terms of the general conditions, drawings and specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner.

(b) To submit to the contractor applications for payment in such reasonable time as to enable the contractor to apply for payment under his contract.

(c) To make all claims for extras, for extensions of time and for damages for delays or otherwise, to the contractor in the manner provided in the general conditions for like claims by the contractor upon the owner, except that the time for making claims for extra cost is one week.

The contractor agrees.

(d) To be bound to the subcontractor by all the obligations that the owner assumes to the contractor under the general conditions, drawings and specifications, and by all the provisions thereof affording remedies and redress to the contractor from the owner.

(e) To pay the subcontractor, upon the issuance of certificates, if issued under a schedule of values, the amount allowed to the contractor on account of the subcontractor's work to the extent of the subcontractor's interest therein.

(f) To pay the subcontractor, upon the issuance of certificates, if issued otherwise than as in (e), so that at all times his total payments shall be as large in proportion to the value of the work done by him as the total amount certified to the contractor is to the value of the work done by him.

(g) To pay the subcontractor to such extent as may be provided by the contract documents or the subcontract, if either of these provides for earlier or larger payments than the above.

(h) To pay the subcontractor on demand for his work or materials as far as executed and fixed in place, less the retained percentage, at the time the certificate should issue, even though the architect fails to issue it for any cause not the fault of the subcontractor.

(j) To pay the subcontractor a just share of any fire insurance money received by him, the contractor, under the general conditions.

(k) To make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract.

(l) That no claim for services rendered or materials furnished by the contractor to the subcontractor shall be valid unless written notice thereof is given by the contractor to the subcontractor during the first ten days of the calendar month following that in which the claim originated.

(m) To give the subcontractor an opportunity to be present and to submit evidence in any arbitration involving his rights.

(n) To name as arbitrator under the general conditions, the person nominated by the subcontractor if the sole cause of dispute is the work, materials, rights or responsibilities of the subcontractor; or, if of the subcontractor and any other subcontractor jointly, to name as such arbitrator the person upon whom they agree.

The contractor and the subcontractor agree that:

(o) In the matter of arbitration, their rights and obligations and all procedure shall be analogous to those set forth in the general conditions.

Nothing herein shall create any obligation on the part of the owner to pay or to see to the payment of any sums to any subcontractor.

Section 6.

Finally. The subcontractor and contractor, for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In witness whereof they have hereunto set their hands the day and date first above written.

———, Subcontractor.
———, Contractor.

In presence of
———.
———.

FORM VI

FORM OF INVITATION TO BID

Dear Sir: You are invited to submit a proposal for ———. Drawings, specifications, and other information may be procured from this office on and after ———. All documents must be returned to this office not later than ———.

To be entitled to consideration the proposal must be made upon the form provided by the architect, which must be fully completed in accordance with the accompanying "Instructions to Bidders" and must be delivered to this office not later than ———.

Very truly yours, ———.

FORM VII

FORM OF INSTRUCTIONS TO BIDDERS

Proposals, to be entitled to consideration, must be made in accordance with the following instructions:

Proposals shall be made upon the form provided therefor, and all blank spaces in the form shall be fully filled; numbers shall be stated both in figures and in writing; the signature shall be in long hand; and the completed form shall be without interlineation, alteration or erasure.

Proposals shall not contain any recapitulation of the work to be done. No oral, telegraphic or telephonic proposals or modifications will be considered.

Proposals shall be addressed to the owner, in care of the architect, and shall be delivered to the architect inclosed in an opaque sealed envelope addressed to him, marked "Proposal" and bearing the title of the work and the name of the bidder.

Should a bidder find discrepancies in, or omissions from, the drawings or documents, or should he be in doubt as to their meaning, he should at once notify the architect, who will send a written instruction to all bidders. Neither owner nor architect will be responsible for any oral instructions.

Before submitting a proposal, bidders should carefully examine the drawings and specifications, visit the site or work, fully inform themselves as to all existing conditions and shall include in the proposal a sum to cover the cost of all items included in the contract.

The competency and responsibility of bidders and of their proposed subcontractors will be considered in making the award. The owner does not obligate himself to accept the lowest or any other bid.

Provision will be made in the agreement for payment on account in the following words: (Insert the provision.)

Any bulletins issued during the time of bidding are to be covered in the proposal and in closing a contract they will become a part thereof.

FORM VIII

FORM OF BID

(The proposal should be dated and addressed to the owner, in care of the architect.)

Dear Sir: Having carefully examined the instructions to bidders, the general conditions of the contract and specifications entitled (here insert the caption descriptive of the work as used therein) and the drawings, similarly entitled, numbered ———, as well as the premises and the conditions affecting the work, the undersigned proposes to furnish all materials and labor called for by them for (here insert, in case all the work therein described is to be covered by one contract, "the entire work"; in case of a partial contract, insert name of the trade or trades to be covered and the numbers of the pages of the specifications on which the work is described) in accordance with the said documents, for the sum of ——— dollars ($———) and to execute a contract for the above work, for the above stated compensation in the form of the Standard Agreement of the American Institute of Architects (fourth edition), provided that he be notified of the acceptance of this proposal within ——— days of the time set for the submission of bids.

The undersigned further agrees, if awarded the contract, to complete it within ——— days, Sundays and holidays not included, and further agrees that, from the compensation otherwise to be paid, the owner may retain the sum of ——— dollars ($———) for each day thereafter that the work remains uncompleted, which sum is agreed upon as the proper measure of liquidated damages which the owner will sustain per diem by the failure of the undersigned to complete the work at the time stipulated, and this sum is not to be construed as in any sense a penalty.

(If a bond is required, insert the following:)

The undersigned agrees, if awarded the contract, to execute and deliver to the architect within ——— days after the signing of the contract, a good and satisfactory bond for the faithful performance of the contract and in the sum of ———, extending from the time of signature for ——— months from the day on which the final payment under the contract falls due, and further agrees that if such bond be not required, he will deduct from the proposed price the sum of ——— dollars ($———).

The undersigned further agrees that the certified check payable to ———, owner, accompanying this proposal, is left in escrow with the architect; that its amount is the measure of liquidated damages which the owner will sustain by the failure of the undersigned to execute the above-named agreement and bond, and that, if the undersigned defaults in executing that agreement within ——— days of written notification of the award of the contract to him, or in furnishing the bond within ——— days thereafter, then the check shall become the property of the owner, but if this proposal is not accepted within ——— days of the time set for the submission of bids, or if the undersigned executes and delivers said contract and bond, the check shall be returned to him on his demand.

Alternative Proposals.—Should ——— be substituted for ———, the undersigned agrees to deduct (or will require the addition of) ——— dollars ($———) from (or to) the proposed sum.

If unit prices are required in proposal: The undersigned agrees that

work added shall be computed at the following prices, and that work omitted shall be computed at ——— per cent. less than these prices: Concrete foundations, ——— per cubic yard. Rough brickwork, ——— per thousand. Plastering ——— per yard.

In case of obtaining the award the undersigned will employ, subject to the architect's approval, subcontractors in each of the several trades selected from the following list (one or more names must be inserted for each trade):

Excavation, ———.
Stone masonry, ———.
Brickwork, ———.
etc., etc.

(Signed) ———, Bidder.

FORM IX

STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT

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This agreement, made the ——— day of ——— in the year nineteen hundred and ——— by and between ———, hereinafter called the owner, and ———, hereinafter called the architect, witnesseth, that whereas the owner intends to erect ———:

Now, therefore, the owner and the architect, for the considerations hereinafter named, agree as follows:

The architect agrees to perform, for the above-named work, professional services as hereinafter set forth.

The owner agrees to pay the architect for such services a fee of ——— per cent. of the cost of the work, with other payments and reimbursements as hereinafter provided, the said percentage being hereinafter referred to as the "basic rate."

The parties hereto further agree to the following conditions:

1. The Architect's Services.—The architect's professional services consist of the necessary conferences, the preparation of preliminary studies, working drawings, specifications, large scale and full size detail drawings; the drafting of forms of proposals and contracts; the issuance of certificates of payment; the keeping of accounts, the general administration of the business and supervision of the work.

2. Reimbursements.—The owner is to reimburse the architect the costs of transportation and living incurred by him and his assistants while traveling in discharge of duties connected with the work, and the costs of the services of heating, ventilating, mechanical and electrical engineers.

3. Separate Contracts.—The basic rate applies to work let under a single contract. For any portions of the work let under separate con-

tracts, on account of extra service thereby required, the rate shall be four per cent. greater, and if substantially all the work is so let the higher rate shall apply to the entire work; but there shall be no such increase on any contracts in connection with which the owner reimburses the engineers' fees to the architect, or for articles not designed by the architect but purchased under his direction.

4. Extra Services and Special Cases.—If the architect is caused extra draughting or other expense due to changes ordered by the owner, or due to the delinquency or insolvency of the owner or contractor, or as a result of damage by fire, he shall be equitably paid for such extra expense and the service involved.

Work let on any cost-plus basis shall be the subject of a special charge in accord with the special service required.

If any work designed or specified by the architect is abandoned or suspended the architect is to be paid for the service rendered on account of it.

5. Payments.—Payments to the architect on account of his fee shall be made as follows, subject to the provisions of article 4:

Upon completion of the preliminary studies, a sum equal to 20 per cent. of the basic rate computed upon a reasonable estimated cost.

Upon completion of specifications and general working drawings (exclusive of details), a sum sufficient to increase payments on the fee to 60 per cent. of the rate or rates of commission arising from this agreement, computed upon a reasonable cost estimated on such completed specifications and drawings, or if bids have been received, then computed upon the lowest bona fide bid or bids.

From time to time during the execution of work and in proportion to the amount of service rendered by the architect, payments shall be made until the aggregate of all payments made on account of the fee under this article, but not including any covered by the provisions of article 4, shall be a sum equal to the rate or rates of commission arising from this agreement, computed upon the final cost of the work.

Payments to the architect, other than those on his fee, fall due from time to time as his work is done or as costs are incurred.

No deductions shall be made from the architect's fee on account of penalty, liquidated damages, or other sums withheld from payments to contractors.

6. Survey, Borings and Tests.—The owner shall, so far as the work under this agreement may require, furnish the architect with the following information: A complete and accurate survey of the building site, giving the grades and lines of streets, pavements, and adjoining properties; the rights, restrictions, easements, boundaries, and contours of the building site, and full information as to sewer, water, gas and electrical service. The owner is to pay for borings or test pits and for chemical, mechanical, or other tests when required.

7. Supervision of the Work.—The architect will endeavor to guard the owner against defects and deficiencies in the work of contractors, but he does not guarantee the performance of their contracts. The supervision of an architect is to be distinguished from the continuous personal superintendence to be obtained by the employment of a clerk of the works.

When authorized by the owner, a clerk of the works acceptable to both owner and architect shall be engaged by the architect at a salary satisfactory to the owner and paid by the owner, upon presentation of the architect's monthly statements.

8. Preliminary Estimates.—When requested to do so the architect will furnish preliminary estimates on the cost of the work, but he does not guarantee the accuracy of such estimates.

9. Definition of the Cost of the Work.—The cost of the work, as herein referred to, means the cost to the owner, but such cost shall not include any architect's or engineer's fees or reimbursements or the cost of a clerk of the works.

When labor or material is furnished by the owner below its market cost the cost of the work shall be computed upon such market cost.

10. Ownership of Documents.—Drawings and specifications as instruments of service are the property of the architect whether the work for which they are made be executed or not.

11. Successors and Assignments.—The owner and the architect each binds himself, his partners, successors, executors, administrators, and assigns to the other party to this agreement, and to the partners, successors, executors, administrators and assigns of such other party in respect of all covenants of this agreement.

Except as above, neither the owner nor the architect shall assign, sublet or transfer his interest in this agreement without the written consent of the other.

12. Arbitration.—All questions in dispute under this agreement shall be submitted to arbitration at the choice of either party.

The owner and the architect hereby agree to the full performance of the covenants contained herein,

In witness whereof they have executed this agreement, the day and year first above written.

_____.

_____.

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